PATTERN JURY INSTRUCTIONS

for CIVIL PRACTICE

in the SUPERIOR COURT of the STATE of DELAWARE

2000 EDITION

Revised in part 8/1/2003

[Cite as: DEL. P.J.I. CIV. § xx.xx (2000).]

Disclaimer: The following civil jury instructions were compiled as a reference guide for the benefit of practitioners in Superior Court. The instructions are merely advisory and the practitioner should not use these instructions without also reviewing the applicable statutes, court rules, and case law. While the Review Committee has made every effort to conform these instructions to the prevailing law, they are always subject to review by the Supreme Court.

Introduction to the 2000 Edition of the Pattern Jury Instructions for Civil Practice in Superior Court

The 2000 edition of the pattern jury instructions contains new instructions, revised texts of previous instructions and commentary, annotations, as well as corrections of typographical errors, etc. An additional special verdict form has also been added. The numbering and layout of the instructions has also changed.

Given these changes, earlier editions of the pattern instructions should be deleted and/or thrown away.

The following instructions are new:

1.1A	Additional Voir Dire
3.8	English Translation
4.12A	Comparative Negligence-Special Verdict Form (Multiple Defendants)
15.4B	Business Owner's Duty to Protect Against Crime
17.14	Uninsured/Underinsured Claims

The following instructions contain changes in text and/or commentary from previous editions (the number in the parentheses represents the new instruction number):

5.6 (6.6)	Commonly Cited Motor Vehicle Statutes -§4177(a) -§4123
6.1 (7.1)	Malpractice--Definition
6.1A (7.1A)	Medical Negligence--Definition
6.2 (7.2)	Informed Consent pre 7/7/98
6.2A (7.2A)	Informed Consent post 7/7/98
9.15 (10.15)	Common Carrier: Duty to Public Generally
12.3	Malicious Prosecution--probable cause
15.10	Duty of Landowner to Children
19.7	Consideration
20.2	Condemnation--Compensation defined
21.16 (22.16)	Damages--Invasion of Privacy
21.27 (22.27)	Punitive Damages
21.28 (22.28)	Effect of Instructions as to Damages
21.29 (22.29)	Effect of Instructions as to Punitive Damages
22.2 (4.1)	Evidence Equally Balanced
22.7 (23.4)	Court's Rulings on Objections

The following instructions contain changes (corrections and/or additions) to the annotations (the number in the parentheses represents the new instruction number):

4.11 (5.11)	Contributory Negligence Not a defense
5.6 (6.6)	Commonly Cited Motor Vehicle Statutes
9.18 (10.18)	Domestic Animal with Vicious Propensities
9.19 (10.19)	Dog Bite
9.20 (10.20)	Dog Running Free
10.1 (21.1)	Proximate Cause
11.1	Defamation - Definition
11.2	Libel and Slander - Definition
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21.15 (22.15)	Damages--Defamation - Punitive Damages -- Media Defendant
21.18 (22.18)	Damages--Interference with a Contractual Relationship
21.25 (22.25)	Damages--Wrongful Discharge
22.20 (23.17)	Spoliation
23.2 (24.2)	Juror Notes

With respect to the format of the instructions please note that former jury instructions 22.1, 22.2 and 22.3 are redesignated 4.1, 4.2 and 4.3 under the heading "Burden of Proof." Also former chapter 10, Proximate Cause, has been redesignated chapter 21 and placed before "Evidence and Guides for its Considerations."

If you have any comments or suggestions about the pattern instructions, please contact the review committee. We welcome your response. The committee consists of the following members:

Judge Susan C. Del Pesco, Chair
Stephen P. Casarino
Donald E. Reid
Kenneth M. Roseman
Bernard A. vanOgtrop
Thomas P. Leff
Amy Evans, Reporter to the Committee

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1. VOIR DIRE

VOIR DIRE

Good Morning, Ladies and Gentlemen:

- We are about to select a jury in the case of _____ v. _____ . The plaintiff,_____, has sued the defendant, _____, claiming that [_____].
- We estimate that the trial will take ___ days.
- Do you know anything about this case, through personal knowledge, discussion with anyone, the news media, or any other source?
- Do you know any of the parties in this case or their employees, friends, or relatives?
- The plaintiff is represented by _____, of the law firm _____.

  The defendant is represented by _____, of the law firm _____.

  Do you know the attorneys in this case or any other attorney or employee in their firms?
- Do you know any of the following persons who might be called to testify as witnesses:

  _____ _____

  _____ _____

  _____ _____
- [Add any additional voir dire questions here.]
- Do you have any bias or prejudice either for or against the plaintiff or defendant?
- Is there any reason why you cannot give this case your undivided attention and render a fair and impartial verdict?

- If your answer to any of these questions is YES, or if you cannot serve for ___ days, (_____ __, 199_ through _____ __, 199_), please come forward.

{Bailiff, If there is no response, turn to the Judge and say:

"The answer is negative, your honor."}

Source:

10 *Del. C.* § 4511 (Supp. 1994); *Del. C.* Super. Ct. Civ. R. 47(a); *see Robertson v. State*, Del. Supr., 630 A.2d 1084, 1092 (1993); *Celotex Corp. v. Wilson*, Del. Supr., 607 A.2d 1223, 1227-28 (1992); *Riley v. State*, Del. Supr., 496 A.2d 997, 1009 (1985); *Chavin v. Cope*, Del. Supr., 243 A.2d 694, 696-98 (1968).

1. VOIR DIRE

The following voir dire may be necessary when some testimony will be given in a language other than English:

Would the fact that some testimony will be given in a language other than English influence you in any way?

In the case of a bilingual juror:

{The trial judge should conduct individual voir dire of the juror to determine whether the juror has a sufficient command of English. These questions should elicit more than a "yes" or "no" response.}

The following voir dire may be necessary when some testimony will be given in a language other than English and there is a juror that is proficient in both English and the language of the party or witness:

-Do you believe that you will be able to disregard your own knowledge of [foreign language] and to base your judgment solely upon the interpreter's English translation.

-Will you refrain from discussing your own interpretation of the [foreign language] translation with other jurors?

-Should you have any concern about the English translation please advise the Baliff via a written note.

Source:

10 *Del. C.* §4509; *Diaz v. State*, Del. Supr., 743 A.2d 1166, 1172-1176 (1999).

2. OATHS

OATH for CIVIL JURY

Members of the Jury, please rise. Those of you who will swear on the Bible, take hold of the Bible with your right hand as I call your names. [Those of you who will affirm, raise your right hand.]

{Bailiff, read names.}

Do each of you solemnly swear [or solemnly affirm] that you will decide the issues in this case fairly and honestly, and give a true verdict according to the evidence? Do you further swear [or affirm] that you have fully and truthfully answered all questions put to you about the matter now before the Court?

Please be seated.

Members of the Jury, you have all been sworn or affirmed.

{Bailiff, turn to the Judge and say: "Your Honor."}

{**Comment**: *This Oath has been edited to reflect simpler and non-sectarian language.*}

Source:
10 *Del. C.* § 4518 (petit jury); 10 *Del. C.* §§ 5321-5324 (administration of oaths). *See Lynam v. Latimer*, Del. Err. & App., 7 Del. Cas. 644 (1821)(judgment reversed because of defective swearing of the jury).

2. OATHS

OATH for BAILIFF

Do you, _____, solemnly [swear] [affirm] that you will conduct these jurors to some convenient room and keep them there, and that you will not allow anyone to speak to them, nor will you speak to them yourself, without the Court's permission, except to ask them whether they have agreed on a verdict?

{Turn to the Judge and say: "Your Honor."}

{**Comment**: *This Oath has been edited to reflect simpler and non-sectarian language.*}

Source:

See 10 *Del. C.* § 5301 *et seq.*

2. OATHS

OATH for WITNESS

[Place your right hand on the Bible] [Please raise your right hand] and state your name . . . .

Do you [solemnly swear] [solemnly affirm] that as you testify, you will tell the truth, the whole truth, and nothing but the truth, [so help you God] [so you affirm]?

{Bailiff, after witness says: "I do," turn to the Judge and say: "Your Honor."}

Would you please spell your last (or full) name for the Court?

{**Comment**: *This Oath has been edited to reflect simpler and non-sectarian language.*}

Source:
D.R.E. 603 (witnesses); *Del. C.* Super. Ct. Civ. R. 43(c) (affirmation may be accepted in lieu of Oath).

2. OATHS

OATH for INTERPRETERS

Do you solemnly [swear] [affirm] that you will interpret accurately, completely, and impartially, using your best skill and judgment in accordance with the Code of Professional Responsibility for Court Interpreters?

{Bailiff, turn to the Judge and say: "Your Honor."}

{**Comment**: *This Oath has been edited to reflect simpler and non-sectarian language.*}

Source:
D.R.E. 604 (interpreters); *Del. C.* Super. Ct. Civ. R. 43(c) (affirmation may be accepted in lieu of Oath).

3. GENERAL INSTRUCTIONS

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[**INSERT CASE CAPTION AND NUMBER**]

PROPOSED JURY INSTRUCTIONS

Date: [_____ __, ____]

----------, Esquire, of --------, --------- & ------, [__City__], Delaware, for the plaintiffs;

----------, Esquire, of ----------, --------- & ----------, [__City__], Delaware, for Defendants.

[_____], J.

3. GENERAL INSTRUCTIONS

PROVINCE OF THE COURT AND JURY

Now that you have heard the evidence and [are about to hear] the arguments of counsel, it is my duty to instruct you about the law governing this case. Although you as jurors are the sole judges of the facts, you must follow the law stated in my instructions and apply the law to the facts as you find them from the evidence. You must not single out one instruction alone as stating the law, but must consider the instructions as a whole.

Nor are you to be concerned with the wisdom of any legal rule that I give you. Regardless of any opinion you may have about what the law ought to be, it would be a violation of your sworn duty to base a verdict on any view of the law other than what I give you in these instructions; It would also be a violation of your sworn duty, as judges of the facts, to base a verdict on anything but the evidence in the case.

Justice through trial by jury always depends on the willingness of each juror to do two things: first, to seek the truth about the facts from the same evidence presented to all the jurors; and, second, to arrive at a verdict by applying the same rules of law as explained by the judge. You should consider only the evidence in the case. Evidence includes the witnesses' sworn testimony and the items admitted into evidence. You are allowed to draw reasonable conclusions from the testimony and exhibits, if you think those conclusions are justified. In other words, use your common sense to reach conclusions based on the evidence.

You have been chosen and sworn as jurors in this case to decide issues of fact. You must perform these duties without bias for or against any of the parties. The law does not allow you

to be influenced by sympathy, prejudice, or public opinion. All the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law, and reach a just verdict, regardless of the consequences.

{**Comment**: *It is recommended that this charge be given at the beginning of the trial proceedings as well as at the end.*}

Source:

DEL. CONST. art. IV, § 19 (1897); *Porter v. State*, Del. Supr., 243 A.2d 699 (1968)(judge may not comment on the facts of the case); *Gutheridge v. Pen-Mod, Inc.*, Del. Super., 239 A.2d 709 (1967)(jury sole judges of the facts); *Girardo v. Wilmington & Philadelphia Traction Co.*, Del. Super., 90 A. 476 (1914)(same). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 70.03, 71.01 (4th ed. 1987); BLACK'S LAW DICTIONARY 555 (6th ed. 1990).

3. GENERAL INSTRUCTIONS

STATEMENTS OF COUNSEL

What the attorneys say is not evidence. Instead, whatever they say is intended to help you review the evidence presented. If you remember the evidence differently from the attorneys, you should rely on your own recollection.

The role of attorneys is to zealously and effectively advance the claims of the parties they represent within the bounds of the law. An attorney may argue all reasonable conclusions from evidence in the record. It is not proper, however, for an attorney to state an opinion as to the truth or falsity of any testimony or evidence. What an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any personal opinion or belief offered by an attorney concerning testimony or evidence.

Source:
See DeAngelis v. Harrison, Del. Supr., 628 A.2d 77, 88 (1993); *McNally v. Eckman*, Del. Supr., 466 A.2d 363, 371-75 (1983); *Delaware Olds, Inc. v. Dixon*, Del. Supr., 367 A.2d 178, 179 (1976). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 70.03 (4th ed. 1987); 75A AM. JUR. 2d §§ 554, 566, 632.

3. GENERAL INSTRUCTIONS

INSTRUCTION TO JURORS AT THE BEGINNING OF TRIAL:

THE ROLE OF ATTORNEYS IN THESE PROCEEDINGS

The role of attorneys is to zealously and effectively advance the claims of the parties they represent within the bounds of the law. An attorney may argue all reasonable conclusions from evidence in the record. It is not proper, however, for an attorney to state an opinion as to the truth or falsity of any testimony or evidence. What an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any personal opinion or belief offered by an attorney concerning testimony or evidence.

Notwithstanding what you have may have seen on television or at the movies, the attorneys in this trial will be expected to act professionally, argue persuasively, and conduct themselves with civility.

Source:

See DeAngelis v. Harrison, Del. Supr., 628 A.2d 77, 88 (1993); *McNally v. Eckman*, Del. Supr., 466 A.2d 363, 371-75 (1983); *Delaware Olds, Inc. v. Dixon*, Del. Supr., 367 A.2d 178, 179 (1976). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 70.03 (4th ed. 1987); 75A AM. JUR. 2d §§ 554, 566, 632.

3. GENERAL INSTRUCTIONS

NATURE OF THE CASE

In this case, the plaintiff, [***plaintiff's name***], is suing for damages that resulted from [__describe elements of claim__]. [***Plaintiff's name***] alleges that [__describe circumstances underlying claim__].

{*If applicable*}: [***Plaintiff's name***] is also suing for [__describe other claims__].

[***Defendant's name***] has denied [__admitted__] [__describe elements of claim__] [or] [Liability for the (accident/injury) has been admitted. A dispute remains as to the nature and extent of the injuries suffered by (***plaintiff's name***) and the amount of damages (***he/she***) is entitled to receive].

{*If applicable*}: [***Defendant's name***] alleges that [__state any affirmative defenses or counter / cross-claims__]. [***Defendant's name***] alleges that [__describe circumstances underlying claim__].

Source:
Chesapeake & Potomac Tel. Co. v. Chesapeake Utilities Corp., Del. Supr., 436 A.2d 314, 338 (1981); *Greenplate v. Lowth*, Del. Supr., 199 A. 659, 662-63 (1938). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 70.01 (4th ed. 1987).

3. GENERAL INSTRUCTIONS

GUARDIAN AD LITEM

In a civil case, such as this one, the party that brings the lawsuit is called the plaintiff. The persons against whom the lawsuit is brought are called defendants.

In this case, the plaintiffs are [***plaintiff's name(s) and name of guardian ad litem***]. Because [***plaintiff's name***] is [__a minor / incompetent__] and is not able to handle [***his/her***] own affairs, the Court appointed [***name of guardian ad litem***] to represent [***plaintiff's name***]'s interests in this lawsuit. Such a person is called a guardian *ad litem*. If you make an award for the plaintiffs, you should understand that such an award will be placed in a special trust account for [***plaintiff's name***]. By explaining this to you the Court does not mean to suggest for whom you should render a verdict.

{*if appropriate*:} Hereinafter, I will only refer to [***plaintiff's name***] in these instructions, as [***he/she***] is the real party in interest in this case.

The defendants in this case are [***defendant's name(s)***].

{**Comment**: *This instruction is intended to be used in conjunction with Jury Instr. No. 3.4 - Nature of the Case. The above instruction may need to modified in the situation where a plaintiff other than the minor or incompetent is charged with contributory negligence in which case the instruction should note that any such negligence is not imputed to the minor or incompetent for purposes of an award of damages.*}

Source:
Super.Ct.Civ.R. 17; *See also Cohee v. Richey*, Del. Super., 150 A.2d 830, 831 (1959); BLACK'S LAW DICTIONARY 706 (6th ed. 1990).

3. GENERAL INSTRUCTIONS

CROSS-CLAIMS / THIRD PARTY CLAIMS

In this case, a [__cross-claim / third party claim__] has been filed. The [cross-***plaintiff*** / third party ***plaintiff***] is [***plaintiff's name***]. The [cross-***defendant*** / third party ***defendant***] is [***defendant's name***]. These parties stand in the same relationship to each other as a plaintiff would to a defendant.

A cross-claim or third party claim is simply another set of claims that the parties to the main case have brought against each other or against someone else. The reason you will hear and decide these claims is that they are related to the same facts and circumstances as the main case.

{**Comment**: *It is recommended that this charge be given at the beginning of the trial proceedings.*}

3. GENERAL INSTRUCTIONS

PLAINTIFF'S CONTENTIONS

(1)

. . . . [*Fill in appropriate contentions*.]

DEFENDANT'S CONTENTIONS

(1)

. . . . [*Fill in appropriate contentions*.]

3. GENERAL INSTRUCTIONS

COURTROOM INTERPRETATION

{**Comment**: *The three following instructions should be read as a single group. Each English instruction should be immediately followed by a recitation of a translated version in the language to be used.*}

Interpretation of the Proceedings:

This Court seeks a fair trial for all regardless of the language a person speaks and regardless of how well a person may, or may not, use the English language. Bias against or for persons who have little or no proficiency in English, or because they do not use English, is not allowed. The fact that any party requires an interpreter must not influence you in any way.

{*If Spanish interpretation is to be used, recite the following translation*:

Esta Corte busca un juicio para todos sin considerar que lengua hablan y sin considerar el bien o mal uso que hagan de la lengua inglesa. Prejuicio contra o hacia personas que tienen poco o nada de pericia en el idioma ingles, porque nunca lo usan, no es permitido. Por lo tanto, de niguna manera permita usted ser influenciado por el hecho de que la parte requere un interprete.

{*If interpretation into any other language is required, recite a translation of the English passage above in that language.*}

Source:

Del. Supr. Admin. Directive 107 (1996).

COURTROOM INTERPRETATION

{**Comment**: *The following English instruction should be read and then immediately followed by a recitation of a translated version in the other language to be used.*}

Witness Interpretation:

Treat the interpretation of the witness's testimony as if the witness had spoken English and no interpreter were present. Do not allow the fact that testimony is given in a language other than English to affect your view of the witness's credibility.

{*If Spanish interpretation is to be used, recite the following translation*:

Trate la interpretacion del testigo como si el testigo hubiera hablado en ingles y sin un interprete presente. No permita el hecho de que el testimonio es dado en una lengua, que no es el ingles, afecte su opinion acerca de la credibilidad del testigo.

{*If interpretation into any other language is required, recite a translation of the English passage above in that language.*}

Source:

Del. Supr. Admin. Directive 107 (1996).

COURTROOM INTERPRETATION

{**Comment**: *The following English instruction should be read and then immediately followed by a recitation of a translated version in the other language to be used.*}

Court Interpreters:

I want you to understand the role of the court interpreter. The court interpreter is here only to interpret the questions that you are asked and to interpret your responses. They will say only what we or you say and will not add to your testimony, omit anything you say, or summarize what you say. They are not lawyers and are prohibited from giving legal advice.

If you do not understand the court interpreter, please let me know. If you need the interpreter to repeat something you missed, you may do so.

Do you have any questions about the role or responsibilities of the court interpreter?

{*If Spanish interpretation is to be used, recite the following translation*:

Yo quiero que usted comprenda la funcion del interprete de la corte. El interprete de corte esta aqui solamente para interpretar las preguntas dirigidas a usted y para interpretar sus repuestas. Ellos diran solamente lo que nosotros o usted decimos y no agregaran nada a su testimonio, no omitiran nada que usted diga, ni resumiran lo que usted diga. Ellos no son abogados y les esta prohibido dar consejo legal.

Si usted no comprende al interprete de la corte, por favor hagamelo saber. Si usted

necesita que el interprete repita algo que usted no capto, puede hacerlo.

Tiene usted alguna pregunta acerca de la funcion o de las responsabilidades del interprete de la corte?

{*If interpretation into any other language is required, recite a translation of the English passage above in that language.*}

Source:

Del. Supr. Admin. Directive 107 (1996).

3. GENERAL INSTRUCTIONS

ENGLISH TRANSLATION

Languages other than English may be used during this trial. The evidence you are to consider is only that provided through the official court interpreter. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.

Comment: This instruction is appropriate when there is a juror proficient in English as well as the language of a party or witness that will be translated by an interpreter during the trial. The instruction should be given prior to opening arguments and at the end of the case.

Source:

Diaz v. State, Del. Supr., 743 A.2d 1166, 1175 (1999).

4. BURDEN OF PROOF

BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE

In a civil case such as this one, the burden of proof is by a preponderance of the evidence. Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not. Preponderance of the evidence does not depend on the number of witnesses. If the evidence on any particular point is evenly balanced, the party having the burden of proof has not proved that point by a preponderance of the evidence, and you must find against the party on that point.

In deciding whether any fact has been proved by a preponderance of the evidence, you may, unless I tell you otherwise, consider the testimony of all witnesses regardless of who called them, and all exhibits received into evidence regardless of who produced them.

{*If necessary, add*}:

In this particular case, [***plaintiff's name***] must prove all the elements of [***his/her***] claim of [__state the nature of the claim__] by a preponderance of the evidence. Those elements are as follows:

(1) . . . . [__state element__] . . . [etc.]

{*if applicable*}:

[***Party's name***] has alleged a [__counterclaim / cross-claim / third-party claim, etc.__] of [__state claim(s)__]. [***Party's name***] has the burden of proof and must establish all elements of

that claim by a preponderance of the evidence. Those elements are as follows:

(1) . . . . [__state element__] . . . [etc.]

{*For an affirmative defense claiming comparative negligence*}:

[***Defendant's name***] has pleaded comparative negligence and therefore has the burden of proving each of the following elements of [***his/her/its***] this defense:

First, that [***plaintiff's name***] was negligent in at least one of the ways claimed by [***defendant's name***]; and

Second, that [***plaintiff's name***]'s negligence was a cause of [***his/her/its***] own injury and therefore was contributory negligence.

Source:

Reynolds v. Reynolds, Del. Supr., 237 A.2d 708, 711 (1967)(defining preponderance of the evidence); *McCartney v. Peoples Ry. Co.*, Del. Super., 78 A. 771, 772 (1911)(same); *Oberly v. Howard Hughes Medical Inst.*, Del. Ch., 472 A.2d 366, 390 (1984)(same). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.01 (4th ed. 1987).

DEL. CODE ANN. tit. 10, § 8132 (1999) (elements of comparative negligence); *Duphily v. Delaware Elec. Coop., Inc.*, Del. Supr., 662 A.2d 821, 828 (1995)(basic elements of negligence claim); *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096-97 (1991)(same); *McGraw v. Corrin*, Del. Supr., 303 A.2d 641 (1973)(comparative negligence).

4. BURDEN OF PROOF

EVIDENCE EQUALLY BALANCED

If the evidence tends equally to suggest two inconsistent views, neither has been established. That is, where the evidence shows that one or two things may have caused the [__accident/breach/loss__]: one for which [***defendant's name***] was responsible and one for which [***he/she/it***] was not. You cannot find for [***plaintiff's name***] if it is just as likely that the [__accident/breach/loss__] was caused by one thing as by the other.

In other words, if you find that the evidence suggests, on the one hand, that [***defendant's name***] is liable, but on the other hand, that [***he/she/it***] is not liable, then you must not speculate about the suggested causes of the [__accident/breach/loss__]; in that circumstance you must find for [***defendant's name / party having burden of proof on that issue***].

Source:

Eskridge v. Voshell, Del. Supr., 1991 WL 78471, **3 (1991)(1991 Del. Lexis 155, *7 (1991)); Voshell *v. Attix*, Del. Supr., No. 435, 1989, slip op. at 5, Walsh, J. (Mar. 21, 1990); *Law v. Gallegher*, Del. Supr., 197 A. 479, 488 (1938); *Gutheridge v. Pen-Mod, Inc.*, Del. Super., 239 A.2d 709, 713 (1967). *See also Hopkins v. E.I. duPont de Nemours & Co.*, 3d Cir., 212 F.2d 623 (1954).

4. BURDEN OF PROOF

BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE

[***Plaintiff's name***] must prove the claim by "clear and convincing" evidence. Clear and convincing evidence is a stricter standard of proof than proof by a preponderance of the evidence, which merely requires proof that something is more likely than not. To establish proof by clear and convincing evidence means to prove something that is highly probable, reasonably certain, and free from serious doubt.

Source:

Hudak v. Procek, Del. Supr. 806 A.2d 140, 147 (2002); *See Walsh v. Bailey*, Del. Supr., 197 A.2d 331 (1964); *Shipman v. Division of Soc. Servs.*, Del. Fam., 454 A.2d 767, 769 (1982), *aff'd*, Del. Supr., 460 A.2d 528 (1983); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982). *See also* BLACK'S LAW DICTIONARY 235 (Garner, ed. 1996)(pocket ed.); 29 AM. JUR. 2d, Evidence § 1167; 32A C.J.S., Evidence § 1023.

5. GENERAL NEGLIGENCE

NEGLIGENCE DEFINED

This case involves claims of negligence. Negligence is the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances. That standard is your guide. If a person's conduct in a given circumstance doesn't measure up to the conduct of an ordinarily prudent and careful person, then that person was negligent. On the other hand, if the person's conduct does measure up to the conduct of a reasonably prudent and careful person, the person wasn't negligent.

{*Add the following sentence if <u>not</u> using Jury Instr. No. 4.4, "Negligence is Never Presumed."*}

The mere fact that an accident occurred isn't enough to establish negligence.

Source:

Russell v. K-Mart, Del. Supr., 761 A.2d 1, 5 (2000); Duphily *v. Delaware Elec. Coop., Inc.*, Del. Supr., 662 A.2d 821, 828 (1995); *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096-97 (1991); *Robelen Piano Co. v. Di Fonzo*, Del. Supr., 169 A.2d 240 (1961); *Rabar v. E.I. duPont de Nemours & Co.*, Del. Super., 415 A.2d 499, 506 (1980); *DeAngelis v. U.S.A.C. Transport*, Del. Super., 105 A.2d 458 (1954); *Kane v. Reed*, Del. Super., 101 A.2d 800 (1954).

5. GENERAL NEGLIGENCE

NO NEED TO PROVE ALL CHARGES OF NEGLIGENCE

Each party has alleged that the other was negligent in various ways, but a party does not have to be negligent in all these ways to be liable. You may find a party liable if that party was negligent in any one of the ways charged and if that negligence was a proximate cause of the accident.

5. GENERAL NEGLIGENCE

NO DUTY TO ANTICIPATE NEGLIGENCE

Nobody is required to anticipate someone else's negligence. [__A driver / A person__] is allowed to assume that another [__driver / person__] will not act negligently until [***he/she***] knows or should know that the other person is acting or is about to act negligently. Therefore, a [__driver / person__] is required to act reasonably and prudently under the circumstances of the particular situation.

Source:
Bullock v. State, Del. Supr., 775 A.2d 1043, 1052 (2001); *Furek v. University of Delaware*, Del. Supr., 594 A.2d 506, 523 (1991); *Levine v. Lam*, Del. Supr., 226 A.2d 925, 926-27 (1967); *Biddle v. Haldas Bros.*, Del. Super., 190 A. 588, 595 (1937).

5. GENERAL NEGLIGENCE

NEGLIGENCE IS NEVER PRESUMED

Negligence is never presumed. It must be proved by a preponderance of the evidence before [***plaintiff's name***] is entitled to recover. No presumption that [***defendant's name***] was negligent arises from the mere fact that an accident occurred.

Source:
Levine v. Lam, Del. Supr., 226 A.2d 925, 926-27 (1967); *Wilson v. Derrickson*, Del. Supr., 175 A.2d 400 (1961); *Biddle v. Haldas Bros.*, Del. Super., 190 A. 588, 595 (1937).

5. GENERAL NEGLIGENCE

MULTIPLE DEFENDANTS

There are several defendants in this case. Some may be liable while others are not. All the defendants are entitled to your fair consideration of their own defenses. If you find against one defendant, that shouldn't affect your consideration of other defendants. Unless I tell you otherwise, all my instructions apply to every defendant.

Source:
Laws v. Webb, Del. Supr., 658 A.2d 1000, 1007 (1995); *See Travelers Ins. Co. v. Magic Chef, Inc.*, Del. Supr., 483 A.2d 1115 (1984); *Diamond State Tel. Co. v. University of Delaware*, Del. Supr., 269 A.2d 52, 56 (1970).

JOINT TORTFEASORS

If two or more [***defendants / parties***] are negligent, and their negligence combines to cause injury, you must determine their relative degrees of fault. Using 100% as the total amount of the [***defendants' / parties'***] negligence, you must decide the percentage of each defendant's negligence [__as well as the contributory negligence of the plaintiff__], if any. I will give you a special-verdict form for this purpose. Your answers in this form will enable me to apportion damages.

{*If appropriate*}:

The fact that the plaintiff has settled with one of the defendants should have no bearing on your verdict: The Court will take the settlement into account when entering judgment based on your verdict.

Source:

DEL. CODE ANN. tit. 10, §§ 6302, 6304, 8132 (1999); *Alexander v. Cahill*, Del. Supr., 2003 WL 1793514, *5-6 (2003) (2003 Del. Lexis 199, *17-19 (2003)); *Sears Roebuck & Co. v. Huang*, Del. Supr., 652 A.2d 568, 573 (1995); *Medical Ctr. of Delaware v. Mullins*, Del. Supr., 637 A.2d 6 (1994); *Blackshear v. Clark*, Del. Supr., 391 A.2d 747 (1978); *Farrall v. A.C. & S. Co.*, Del. Super., 586 A.2d 662 (1990).

NEGLIGENCE AS A MATTER OF LAW

A person is also considered negligent if he or she violates a [__statute / regulation__] that has been enacted for people's safety. The violation of [__identify statute / regulation__] is negligence as a matter of law. If you find that [***defendant / plaintiff's name***] has violated the [__statute / regulation__] that I'm about to read to you, then you must conclude that [***defendant / plaintiff's name***] was negligent.

{**Comment**: *See Jury Instr. No. 5.6 -- Motor Vehicle Statutes.*}

Source:

Price v. Blood Bank of Delaware, Inc., Del. Supr., 790 A.2d 1203, 1212-13 (2002); *Toll Bros. Inc. v. Considine*, Del. Supr., 706 A.2d 493 (1998); *Delaware Elec. Coop., Inc. v. Duphily*, Del. Supr., 703 A.2d 1202, 1208-09 (1997);
Duphily v. Delaware Elec. Coop., Inc., 662 A.2d 821, 828 (1995); *Wright v. Moffitt*, Del. Supr., 437 A.2d 554, 557 (1981); *Crawford v. Gilbane Bldg. Co.*, Del. Super., 563 A.2d 1066 (1986); *Nance v. Rees*, Del. Supr., 161 A.2d 795, 797 (1960). *See also* PROSSER & KEETON ON TORTS § 36 (5th ed. 1984).

5. GENERAL NEGLIGENCE

INTENTIONAL CONDUCT DEFINED

Intentional conduct means conduct that a person undertook with a knowing desire or with a conscious objective or purpose.

Source:

See DEL. CODE ANN. tit. 11, § 231(a) (2001).

5. GENERAL NEGLIGENCE

RECKLESS CONDUCT DEFINED

Reckless conduct reflects a knowing disregard of a substantial and unjustifiable risk. It amounts to an "I don't care" attitude. Recklessness occurs when a person, with no intent to cause harm, performs an act so unreasonable and so dangerous that he or she knows, or should know, that harm will probably result.

Source:

See Tackett v. State Farm Fire and Cas. Ins. Co. Del Supr., 653 A.2d 254, 265-66 (1995); *See also Jardel Co. v. Hughes*, Del. Supr., 523 A.2d 518, 529-30 (1987). *See also* DEL. CODE ANN. tit. 11, § 231(c) (2001); *Hamilton v. State*, Del. Supr., 816 A.2d 770, 773-74 (2003).

5. GENERAL NEGLIGENCE

WILLFUL AND WANTON CONDUCT DEFINED

Willfulness indicates an intent, or a conscious decision, to disregard the rights of others. Willfulness is a conscious choice to ignore consequences when it is reasonably apparent that someone will probably be harmed.

Wanton conduct occurs when a person, though not intending to cause harm, does something so unreasonable and so dangerous that the person either knows or should know that harm will probably result. It reflects a foolhardy "I don't care" attitude.

Source:

Koutoufaris v. Dick, Del. Supr., 604 A.2d 390, 399 (1992); *Furek v. University of Delaware*, Del. Supr. 594 A.2d 506, 523 (1991); *Jardel Co. v. Hughes*, Del. Supr., 523 A.2d 518, 529-30 (1987); *Eustice v. Rupert*, Del. Supr., 460 A.2d 507, 509-11 (1983); *Yankanwich v. Wharton*, Del. Supr., 460 A.2d 1326, 1331 (1983); *Aastad v. Rigel*, Del. Supr., 272 A.2d 715, 717 (1970); *Wagner v. Shanks*, Del. Supr., 194 A.2d 701 (1963); *Creed v. Hartley*, Del. Supr., 199 A.2d 113 (1962); *Sadler v. New Castle County*, Del. Super., 524 A.2d 18, *aff'd*, Del. Supr., 565 A.2d 917 (1987).

5. GENERAL NEGLIGENCE

CONTRIBUTORY NEGLIGENCE NOT A DEFENSE

WHERE INTENTIONAL, RECKLESS, WILLFUL OR WANTON CONDUCT FOUND

If you find that [***defendant's name***] acted in a [__intentional, reckless, willful or wanton__] manner and that this conduct was a proximate cause of the accident and injuries in this case, then even if you find that [***plaintiff's name***] was negligent and that this negligence was also a proximate cause of the accident, [***plaintiff's name***]'s negligence does not affect whether [***plaintiff's name***] can recover damages.

Source:

Koutoufaris v. Dick, Del. Supr., 604 A.2d 390, 398-99 (1992); *Green v. Millsboro Fire Co.*, Del. Super., 385 A.2d 1135, *aff'd in part and rev'd in part*, 403 A.2d 286 (1978); *Gott v. Newark Mtrs. Inc.*, Del. Super., 267 A.2d 596 (1970).

• *Gushen v. Penn. Cent. Transp. Co.,* Del. Supr., 280 A.2d 708, 710 (1971); *Green v. Millsboro Fire Co.*, both suggest that this instruction should not apply if the plaintiff's conduct is wanton.

5. GENERAL NEGLIGENCE

COMPARATIVE NEGLIGENCE - SPECIAL VERDICT FORM

[***Defendant's name***] alleges that [***plaintiff's name***]'s negligence proximately caused the accident. Negligence is negligence no matter who commits it. When the plaintiff is negligent, we call it contributory negligence. Under Delaware law, a plaintiff's contributory negligence doesn't mean that the plaintiff can't recover damages from the defendant as long as the plaintiff's negligence was no greater than the defendant's negligence. Instead of preventing a recovery, Delaware law reduces the plaintiff's recovery in proportion to the plaintiff's negligence.

If you find contributory negligence was a proximate cause of the [__accident / injury__], you must determine the degree of that negligence, expressed as a percentage, attributable to [***plaintiff's name***]. Using 100% as the total combined negligence of the parties, you must determine what percentage of negligence is attributable to [***plaintiff's name***]. I will furnish you with a special-verdict form for this purpose. If you find that [***plaintiff's name***]'s negligence is no more than half the total negligence, I will reduce the total amount of [***plaintiff's name***]'s damages by the percentage of [***his/her***] contributory negligence. If you find that [***plaintiff's name***]'s negligence is more than half the total negligence, [***plaintiff's name***] may not recover any damages.

Source:

DEL. CODE ANN. tit. 10, § 8132 (1999); *Del. C.* Super. Ct. Civ. R. 49; *Trievel v. Sabo*, Del. Supr., 714 A.2d 742, 745 (1998)(in rare cases where the evidence requires a finding that the plaintiff's negligence exceeded the defendant's negligence, it is the duty of the judge to grant a motion for judgment as a matter of law); *Moffitt v. Carroll*, Del. Supr., 640 A.2d 169, 173 (1994); *Grand Ventures, Inc. v. Whaley*, Del. Super., 622 A.2d 655, 664 (1992), *aff'd*, Del. Supr., 632 A.2d 63 (1993)(holding court must try to reconcile any apparent inconsistencies in jury's verdict); *Greenplate v. Lowth*, Del. Super., 199 A. 659, 662-63 (1938)(each party entitled to general and specific instructions on applicable law and rights as the pleadings and evidence fairly justify).

5. GENERAL NEGLIGENCE

COMPARATIVE NEGLIGENCE - SPECIAL VERDICT FORM

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If you find contributory negligence was a proximate cause of the [__accident / injury__], you must determine the degree of that negligence, expressed as a percentage, attributable to [***plaintiff's name***]. Similarly, if you find that one or more than one defendant was negligent, you must determine their relative degrees of fault. Using 100% as the total combined negligence of the parties, you must determine what percentage of negligence is attributable to [***plaintiff's name***][***co-defendants***]. I will furnish you with a special-verdict form for this purpose. If you find that [***plaintiff's name***]'s negligence is no more than half the total negligence, I will reduce the total amount of [***plaintiff's name***]'s damages by the percentage of [***his/her***] contributory negligence. If you find that [***plaintiff's name***]'s negligence is more than half the total negligence, [***plaintiff's name***] may not recover any damages.

Source:

DEL. CODE ANN. tit. 10, § 8132 (1999); Super. Ct. Civ. R. 49; *Brooks v. Delaware Racing Association*, Inc., D. Del., 98-237 GMS, Sleet J. (Jury Instructions); *Trievel v. Sabo*, Del. Supr., 714 A.2d 742, 744 (1998); *Moffitt v. Carroll*, Del. Supr., 640 A.2d 169, 173 (1994); *Grand Ventures, Inc. v. Whaley*, Del. Super., 622 A.2d 655, 664 (1992), *aff'd*, Del. Supr., 632 A.2d 63 (1993)(holding court must try to reconcile any apparent inconsistencies in jury's verdict); *Greenplate v. Lowth*, Del. Super., 199 A. 659, 662-63 (1938)(each party entitled to general and specific instructions on applicable law and rights as the pleadings and evidence fairly justify).

DUTY TO MAINTAIN PROPER LOOKOUT

Drivers have a duty to keep a proper lookout for their own safety. The duty to look implies the duty to see what is in plain view unless some reasonable explanation is offered. A person is negligent not to see what is plainly visible where there is nothing to obscure one's vision, because a person is not only required to look, but also to use the sense of sight in a careful and intelligent manner to see things that a person in the ordinary exercise of care and caution would see under the circumstances.

If you find that any party failed to maintain a proper lookout, you must find that party negligent.

Source:

DEL. CODE ANN. tit. 21, § 4176(b) (1995); *Trievel v. Sabo*, Del. Supr., 714 A.2d 742, 745 (1998); *Stenta v. Leblang*, Del. Supr., 185 A.2d 759 (1962)(pedestrians); *Floyd v. Lipka*, Del. Supr., 148 A.2d 541, 543-44 (1959)(drivers and pedestrians); *Odgers v. Clark*, Del. Super., 19 A.2d 724, 726 (1941)(drivers); *James v. Krause*, Del. Super., 75 A.2d 237 (1950); *Willis v. Schlagenhauf*, Del. Super., 188 A. 700, 703 (1936)(drivers).

6. MOTOR VEHICLES

CONTROL

A driver must keep a vehicle under proper control. This means that the vehicle must be operated at such a speed and with such attention that the driver can stop with a reasonable degree of quickness or steer safely by objects or other vehicles on the highway, depending upon existing circumstances and the likelihood of danger to others.

Therefore, if you find that any party failed to exercise a proper degree of control over a motor vehicle, you must find that party negligent.

Source:

DEL. CODE ANN. tit. 21, § 4176 (1995); *State v. Elliott*, Del. O. & T., 8 A.2d 873, 875-76 (1939).

6. MOTOR VEHICLES

RIGHT TO ASSUME THAT OTHERS WILL USE ORDINARY CARE

Every driver has the right to assume that others will use ordinary care and obey the rules of the road. This right continues until the driver knows, or should know, that somebody else isn't using ordinary care or obeying the rules of the road.

{**Comment**: *See Jury Instr. No. 4.3, "No Duty to Anticipate Negligence."*}

Source:

Chudnofsky v. Edwards, Del. Supr., 208 A.2d 516, 519 (1965).

6. MOTOR VEHICLES

DUTY OF CARE AT AN UNCONTROLLED INTERSECTION

This accident occurred at an uncontrolled intersection. [***Plaintiff's name***] contends that [***he/she***] had the right of way. But even if you determine that [***he/she***] had the right of way, the law requires motorists to keep a proper lookout for other vehicles. A right of way is not absolute; it is only relative. Regardless of having the right of way, a motorist must continuously exercise the due care required by the situation in order to prevent injury to [***himself/herself***] and others.

{**Comment**: *See Jury Instr. No. 5.1, "Lookout."*}

Source:

DEL. CODE ANN. tit. 21, §§ 4131-4133, 4152-4157 (1995); *Bullock v. State*, Del. Supr., 775 A.2d 1043, 1051 (2001); *Szewczyk v. Doubet*, Del. Supr., 354 A.2d 426, 429 (1976); *Newman v. Swetland*, Del. Supr., 338 A.2d 560, 561 (1975); *Wootten v. Kiger*, Del. Supr., 226 A.2d 238, 240 (1967).

6. MOTOR VEHICLES

WAVING OTHER VEHICLES ON

[***Plaintiff / defendant's name***] alleges that [***defendant / plaintiff's name***] was negligent in waving [__***person's name***__] to go forward. Although there is no duty to wave a person forward, once a driver assumes a duty of looking for another, [***he/she***] can be liable if [***he/she***] fails to carry out that duty properly. Even though an act is done gratuitously, if the person performing the act anticipated that another will rely on the act, then a duty existed to perform the act properly.

A driver may rely on the assurance of another if it's reasonable to do so under the circumstances. If you find that [__***person's name***__] reasonably believed that [***he/she***] was given an assurance by [***plaintiff / defendant's name***] that [***he/she***] could go forward, then [***his/her***] reliance on that assurance is not considered negligence.

Source:

See Glanzer v. Shepard, N.Y. App. 135 N.E. 275 (1922).

6. MOTOR VEHICLES

COMMONLY CITED MOTOR VEHICLE STATUTES

[***Plaintiff / defendant's name***] charges [***defendant / plaintiff's name***] with violation of the following statutes. If you find that a party has violated a statutory provision, then the violation automatically amounts to negligence by that party.

{*If applicable, insert after the relevant statute to be cited*}:

Before the violation of any traffic statute can be determined, it must first be established whether, under the circumstances at the time of the accident, an ordinary, prudent motorist would or should have been able to ascertain the duty to [__describe statutory duty__]. If an ordinary, prudent driver would not have been able to ascertain this duty, then a technical violation of a motor vehicle statute will be excused, and there is no negligence as a matter of law. If an ordinary, prudent driver could or should have been able to [__describe statutory duty__], then a violation of this motor vehicle statute by [***defendant / plaintiff's name***] automatically amounts to negligence.

{**Comment**: *The second paragraph is intended for use only in circumstances where the party charged with violating a traffic statute, has made a threshhold showing that its statutory duty was not apparent under the circumstances.*}

{**Comment:** *Because so many personal injury claims allege the violation of a motor vehicle statute, the most commonly cited provisions of the code are listed below for your convenience in a form suitable for jury instruction.*}

Source:

Wilmington Country Club v. Cowee, Del. Supr., 747 A.2d 1087, 1094-1095 (2000); *Green v. Millsboro Fire Co.*, Del. Supr., 403 A.2d 286, 289 (1979)(holding that before a violation constitutes negligence per se, it must be determined that the charged party was aware or should have reasonably been aware of the circumstances giving rise to applicable duty); Restatement (Second) of Torts § 288A(2)(b) & cmt.f (same); *See also* 21 *Del. C.* §§ 4141-4151 (pedestrians); *Stenta v. Leblang*, Del. Supr., 185 A.2d 759, 761-62 (1962)(pedestrians); *Floyd v. Lipka*, Del. Supr., 148 A.2d 541, 543-44 (1959) (pedestrians). 21 *Del. C.* §§ 4152-4157 (turning vehicles); *Crouse v. United States*, D. Del., 137 F. Supp. 47 (1955)(turning vehicles). 21 *Del. C.* §§ 4106, 4134, 4188 (emergency vehicles); *Millsboro Fire Co.*, 403 A.2d at 289 (1978)(emergency vehicles); *State Hwy. Dep't v. Buzzato*, Del. Supr., 264 A.2d 347, 352 (1970)(emergency vehicles); *Tolliver v. Moses*, Del. Supr., No. 504, 1996, Hartnett, J. (Aug. 20, 1997)(statutory construction of the term "vehicle" in traffic statute also means "vehicles" and vice versa).

DEL. CODE ANN. tit. 21, § 4114(a),(b) and (c) (1995) - {*Drive on the right side of the road.*}

DEL. CODE ANN. tit. 21, § 4114(a),(b) and (c) (1995) read in part as follows:

(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

(2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

(3) Upon a roadway divided into 3 marked lanes for traffic under the rules applicable thereon; or

(4) Upon a roadway designated and signposted for 1-way traffic.

(b) Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

(c) Upon any roadway having 4 or more lanes for moving traffic and providing for 2-way movement of traffic, no vehicle shall be driven to the left of the center line of the

roadway, except when authorized by signs or markings designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes, or except as permitted under this section. This subsection shall not be construed as prohibiting the crossing of the center line in making a left turn into or from an alley, private roadway, driveway or highway.

* * * * *

DEL. CODE ANN. tit. 21, § 4115 (1995) - {*Keep to the right side of the road.*}

DEL. CODE ANN. tit. 21, § 4115 (1995) reads in part as follows:

> Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than 1 line of traffic in each direction and each driver shall give to the other at least one half of the main-traveled portion of the roadway as nearly as possible.
>
> * * * * *

DEL. CODE ANN. tit. 21, § 4122 (1995) - {*Stay in your lane.*}

DEL. CODE ANN. tit. 21, § 4122 (1995) reads in part as follows:

> Whenever any roadway has been divided into 2 or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply:
>
> (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.
>
> (2) Upon a roadway which is divided into 3 lanes for 2-way traffic, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway is clearly visible and such center lane is clear of oncoming traffic within a safe distance, or in preparation for a left turn or where such center lane is at the time allocated exclusively by traffic-control devices to traffic moving in the direction the vehicle is proceeding.
>
> (3) Traffic-control devices may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway, and drivers of vehicles shall obey the directions of every such traffic-control device.
>
> (4) Traffic-control devices may be installed prohibiting the changing of lanes on sections of roadway and drivers of vehicles shall obey the directions of every such device.

DEL. CODE ANN. tit. 21, § 4123 (1995) - {*Following too closely*}

DEL. CODE ANN. tit. 21, § 4123 (1995) reads in part as follows:

(a) The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

(b) The driver of any truck or vehicle drawing another vehicle when traveling upon a roadway outside of a business or residence district, and which is following another vehicle, shall, whenever conditions permit, leave sufficient space, but not less than 300 feet, so that an overtaking vehicle may enter and occupy such space without danger, except that this shall not prevent a motor vehicle drawing another vehicle from overtaking and passing any vehicle or combination of vehicles.

(c) Vehicles being driven upon any roadway outside of a business or residence district in a caravan or motorcade, whether or not towing other vehicles, shall be so operated as to allow sufficient space between each such vehicle or combination of vehicles so as to enable any other vehicle to enter and occupy such space without danger. This provision shall not apply to funeral processions.

* * * * *

DEL. CODE ANN. tit. 21, § 4132 (1995) - {*Yield to oncoming traffic before making left turn.*}

DEL. CODE ANN. tit. 21, § 4132 (1995) reads in part as follows:

> The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard.
>
> * * * * *

DEL. CODE ANN. tit. 21, § 4154 (1995) - {*Moving a stopped car.*}

DEL. CODE ANN. tit. 21, § 4154 (1995) reads in part as follows:

> No person shall cause a vehicle to be moved which is stopped, standing or parked unless and until such movement can be made with reasonable safety.
>
> * * * * *

DEL. CODE ANN. tit. 21, § 4155 (1995) -- {*Turning Vehicle.*}

DEL. CODE ANN. tit. 21, § 4155 (1995) reads in part as follows:

> No person shall . . . turn a vehicle from a direct course or move right or left upon a roadway . . . until such movement can be made with safety without interfering with other traffic. No person shall so turn any vehicle without giving an appropriate signal . . .
>
> A signal of intention to turn or move right or left when required shall be given continuously during not less than the last 300 feet or more than one-half mile travelled by the vehicle before turning.

DEL. CODE ANN. tit. 21, § 4164(a) (1995) – {*Stop and look before going through an intersection.*}

DEL. CODE ANN. tit. 21, § 4164(a) (1995) reads in part as follows:

> (a) Except when directed to proceed by police officers or traffic-control devices, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop at a marked stop sign, but if none, before entering the crosswalk on the near side of the intersection or if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection.

DEL. CODE ANN. tit. 21, § 4164(b) (1995) - {*Yield the Right of Way.*}

DEL. CODE ANN. tit. 21, § 4164(b) (1995) reads in part as follows:

> (b) The operator of any vehicle who has come to a full stop as provided in subsection (a) of this section shall yield the right-of-way to any vehicle or pedestrian in the intersection or to any vehicle approaching on another roadway so closely as to constitute an immediate hazard and shall not enter into, upon or across such roadway or highway until such movement can be made in safety.
>
> * * * * *

DEL. CODE ANN. tit. 21, § 4168(a) (1995) - {*Speeding.*}

DEL. CODE ANN. tit. 21, § 4168(a) (1995) reads in part as follows:

> (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and without having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any . . . vehicle . . . on . . . the highway, in compliance with legal requirements and the duty of all persons to use due care.
>
> * * * * *

DEL. CODE ANN. tit. 21, § 4168(b) (1995) - {*Excessive speed in hazardous conditions.*}

DEL. CODE ANN. tit. 21, § 4168(b) (1995) reads in part as follows:

(b) The driver of every vehicle shall, consistent with the requirements of subsection (a) of this section, drive at an appropriate speed when approaching and crossing an intersection or railway grade crossing, when approaching any going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

* * * * *

DEL. CODE ANN. tit. 21, § 4171(a) (1995) - {*Driving too slowly.*}

DEL. CODE ANN. tit. 21, § 4171(a) (1995) reads in part as follows:

> (a) No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law.

DEL. CODE ANN. tit. 21, § 4172(a), (b) and (c) (1995) - {*Drag racing.*}

DEL. CODE ANN. tit. 21, § 4172(a) (1995) reads in part as follows:

> (a) No person shall drive any vehicle in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration and no person shall aid, abet, promote, assist or in any manner participate in any such race, competition, contest, test or exhibition.

DEL. CODE ANN. tit. 21, § 4172(b) (1995) reads in part as follows:

> (b) No person shall accelerate or try to accelerate his vehicle at a rate which causes the drive wheels to spin or slip on the road surface. This subsection shall not apply during periods of inclement weather.

DEL. CODE ANN. tit. 21, § 4172(c) (1995) reads in part as follows:

> (c) No owner or person in charge of a vehicle shall permit his vehicle or any vehicle under his control to be used by another person for any of the purposes listed in subsection (a) or (b) of this section. If any vehicle is witnessed by a police officer to be in violation of this section and the identity of the operator is not otherwise apparent, the person in whose name such vehicle is registered as the owner shall be held prima facie responsible for such violation.

* * * * *

DEL. CODE ANN. tit. 21, § 4175(a) (1995) - {*Reckless driving.*}

DEL. CODE ANN. tit. 21, § 4175(a) (1995) reads in part as follows:

(a) No person shall drive any vehicle in willful or wanton disregard for the safety of persons or property, and this offense shall be known as reckless driving.

* * * * *

DEL. CODE ANN. tit. 21, § 4176(a) and (b) (1995) - {*Careless driving / Maintaining proper lookout.*}

DEL. CODE ANN. tit. 21, § 4176(a) (1995) reads in part as follows:

> (a) Whoever operates a motor vehicle on a public highway in a careless or imprudent manner, or without due regard for the road, weather and traffic conditions then existing, shall be guilty of careless driving.

DEL. CODE ANN. tit. 21, § 4176(b) (1995) reads in part as follows:

> (b) Whoever operates a motor vehicle on a public highway and who fails to give full time and attention to the operation of the motor vehicle, or whoever fails to maintain a proper lookout while operating the motor vehicle, shall be guilty of inattentive driving.

* * * * *

DEL. CODE ANN. tit. 21, § 4177(a) (1995) - {*Driving under the influence.*}

DEL. CODE ANN. tit. 21, § 4177(a) (1995) reads in part as follows:

(a) No person shall drive a vehicle:

(1) When the person is under the influence of alcohol;

(2) When the person is under the influence of any drug;

(3) When the person is under the influence of any combination of alcohol and any drug;

(4) When the person's [blood] alcohol concentration is .10 [percent] or more; or

(5) When the person's [blood] alcohol concentration is, within 4 hours after the time of driving, .10 [percent] or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is, within 4 hours after the time of driving .10 or more and that alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when that person was driving.

6. MOTOR VEHICLES

EFFECT OF PLEA OF GUILTY

The evidence shows that [***plaintiff / defendant's name***] pleaded guilty to a motor-vehicle charge. A guilty plea to a charge of violating a motor-vehicle statute is admissible in evidence as an admission against interest. Once admitted, it's up to you to draw any conclusions about the guilty plea. Remember to base your decision on all the facts and circumstances of the case, including [***plaintiff / defendant's name***]'s explanation for pleading guilty.

{**Comment**: *See Jury Instr. No. 22.22 -- Plea of Nolo Contendere. Pleas of no contest are not admissible in evidence.*}

Source:

Alexander v. Cahill, Del. Supr., 2003 WL 1793514, *3 (2003)(2003 Del. Lexis 199, *7-10); *Laws v. Webb*, Del. Supr., 658 A.2d 1000, 1008-09 (1995); *Hamill v. Miller*, Del. Supr., 476 A.2d 161, 162-63 (1984); Boyd *v. Hammond*, Del. Supr., 187 A.2d 413, 416 (1963); *Ralston v. Ralston*, Del. Super., 72 A.2d 441 (1950). *See also* D.R.E. 801(d)(2), 803(8); *Robinson v. State*, Del. Supr., 291 A.2d 279, 281 (1972).

6. MOTOR VEHICLES

{**Comment**: *The application of the Guest Statute with respect to motor vehicles has been repealed.*}

7. HEALTHCARE - MALPRACTICE

DO NOT USE THIS INSTRUCTION

Malpractice - Introduction [pre-7/7/98] . . . . . § 7.1

DEFINITION OF MALPRACTICE

Under a Delaware statute, a healthcare provider that does not meet the applicable standard of care commits medical malpractice:

> The standard of skill and care required of every healthcare provider in rendering professional services or healthcare to a patient shall be that degree of skill and care ordinarily employed, under similar circumstances, by members of the profession in good standing in the same community or locality, and the use of reasonable care and diligence.

The law requires that a [__doctor, nurse, etc.__]'s conduct be judged by the degree of care, skill, and diligence exercised by [__doctors, nurses, etc.__] of the same medical specialty, in the same community, practicing at the time when the alleged malpractice occurred.

On the one hand, if you find that [***defendant's name***] failed to meet this standard and that this failure was a proximate cause of some injury to [***injured party's name***], then your verdict must be for [***plaintiff's name***]. (I shall explain what "proximate cause" means in a moment.) On the other hand, if [***defendant's name***] did meet this standard, then your verdict must be against [***plaintiff's name***].

{if applicable, add the following paragraph:}

You have heard testimony that [__national / regional / local__] standards of care were applicable to the treatment received by [***plaintiff's name***] on [__date(s) of treatment__]. In reaching your verdict, you must decide whether those standards applied to [***defendant's name***] at that time.

Each physician and healthcare provider is held to the standard of care and knowledge commonly possessed by members of his or her profession and specialty in good standing. It is not the standard of care of the most highly skilled, nor is it necessarily that of average members of this profession, since those who have somewhat less than average skills may still possess the degree of skill and care to treat patients competently. When a physician chooses between appropriate alternative medical treatments, harm resulting from a physician's good-faith choice of one proper alternative over the other is not malpractice. [***Plaintiff's name***] cannot prove that [***defendant's name***] committed malpractice merely by showing that another healthcare provider would have acted differently from [***defendant's name***].

Delaware law further requires that to prove liability, [***plaintiff's name***] must present "expert medical testimony" showing that "the alleged deviation from the applicable standard of care" caused the injury.

You may not guess about the standard of care that applies to [***defendant's name***], or whether a departure from that standard injured [***plaintiff's name***]. You must consider only expert testimony, when you determine the applicable standard, decide whether it was met, and -- if it wasn't -- determine what caused [***plaintiff's name***]'s injury. If the expert witnesses have disagreed on the applicable standard of care, on whether it was met, or on the question of cause, you must decide which view is correct.

No presumption of malpractice arises from the mere fact that the patient's treatment had an undesirable result. Malpractice is never presumed. The fact that a patient has suffered injury while in the care of a healthcare provider does not mean that the healthcare provider committed malpractice.

{**Comment**: The change in the locality requirement of DEL. CODE ANN. tit. 18, § 6801(7) (1999) is substantive in nature and may not be applied retroactively to claims of malpractice

allegedly arising before July 7, 1998. *Tyler v. Dworkin*, Del. Super., C.A. No. 94C-01-054 Herlihy, J. (March 15, 1999)(Mem. Op.), *aff'd* Del. Supr., No. 156, 1999, Veasey J. (Dec. 2, 1999)(ORDER)}

Source:

DEL. CODE ANN. tit. 18, §§ 6801(7), 6853, 6854 (1999); *McKenzie v. Blasetto*, Del. Supr., 686 A.2d 160, 163 (1996)(application of a national standard of care may be used when that standard is found to be the same as the relevant Delaware standard); *Medical Ctr. of Delaware v. Lougheed*, Del. Supr., 661 A.2d 1055, 1057-59 (1995); *Greco v. University of Delaware*, Del. Supr., 619 A.2d 900, 903-04 (1993); *Baldwin v. Benge*, Del. Supr., 606 A.2d 64, 68 (1992); *Riggins v. Mauriello*, Del. Supr., 603 A.2d 827, 829-31 (1992); *Register v. Wilmington Med. Ctr.*, Del. Supr., 377 A.2d 8, 10 (1977); *Colemen v. Garrison*, Del. Supr., 349 A.2d 8, 10 (1975); *DiFillippo v. Preston,* Del. Supr., 173 A.2d 333, 336-37 (1961); *cf. Peters v. Gelb*, Del. Supr., 314 A.2d 901, 903-04 (1973)(expert witness who remained in good professional standing but had not actually practiced the particular procedure upon which his opinion was sought could be found by the court as not qualified to testify as an expert).

Sostre v. Swift, Del. Supr., 603 A.2d 809, 812 (1992); *Burkhart v. Davies*, Del. Supr., 602 A.2d 56, 59-60 (1991), *cert. denied*, 112 S. Ct. 1946, 118 L.Ed.2d 551 (1992); *Russell v. Kanaga*, Del. Supr., 571 A.2d 724, 732 (1990); *Loftus v. Hayden*, Del. Supr., 391 A.2d 749 (1978); *Ewing v. Beck*, Del. Supr., 520 A.2d 653 (1987); *Larrimore v. Homeopathic Hosp. Ass'n of Delaware*, Del. Super., 176 A.2d 362, 367-68 (1961), *aff'd*, Del. Supr., 181 A.2d 573, 576-77 (1962)(standard of care for nurses, as for physicians, is a matter of applying the appropriate standard required of the nursing profession in the given circumstances).

7. HEALTHCARE - MEDICAL NEGLIGENCE

DEFINITION OF MEDICAL NEGLIGENCE

Under a Delaware statute, a healthcare provider that does not meet the applicable standard of care commits medical negligence:

> The standard of skill and care required of every healthcare provider in rendering professional services or healthcare to a patient shall be that degree of skill and care ordinarily employed, in the same or similar field of medicine as [the] defendant, and the use of reasonable care and diligence.

The law requires that a [__doctor, nurse, etc.__]'s conduct be judged by the degree of care, skill, and diligence exercised by [__doctors, nurses, etc.__] of the same or similar medical specialty, practicing at the time when the alleged medical negligence occurred.

On the one hand, if you find that [***defendant's name***] failed to meet this standard and that this failure was a proximate cause of some injury to [***injured party's name***], then your verdict must be for [***plaintiff's name***]. (I shall explain what "proximate cause" means in a moment.) On the other hand, if [***defendant's name***] did meet this standard, then your verdict must be against [***plaintiff's name***].

{*if applicable, add the following paragraph:*}

You have heard testimony that [__national / regional / local__] standards of care were applicable to the treatment received by [***plaintiff's name***] on [__date(s) of treatment__]. In reaching your verdict, you must decide whether those standards applied to [***defendant's name***] at that time.

Each physician and healthcare provider is held to the standard of care and knowledge commonly possessed by members in good standing of his or her profession and specialty. It is

not the standard of care of the most highly skilled, nor is it necessarily that of average members of this profession, since those who have somewhat less than average skills may still possess the degree of skill and care to treat patients competently. When a physician chooses between appropriate alternative medical treatments, harm resulting from a physician's good-faith choice of one proper alternative over the other is not medical negligence. [***Plaintiff's name***] cannot prove that [***defendant's name***] committed medical negligence merely by showing that another healthcare provider would have acted differently from [***defendant's name***].

Delaware law further requires that to prove liability, [***plaintiff's name***] must present "expert medical testimony" showing that "the alleged deviation from the applicable standard of care" caused the injury. You may not guess about the standard of care that applies to [***defendant's name***], or whether a departure from that standard injured [***plaintiff's name***]. You must consider only expert testimony, when you determine the applicable standard, decide whether it was met, and -- if it wasn't -- determine what caused [***plaintiff's name***]'s injury. If the expert witnesses have disagreed on the applicable standard of care, on whether it was met, or on the question of cause, you must decide which view is correct.

No presumption of medical negligence arises from the mere fact that the patient's treatment had an undesirable result. Medical negligence is never presumed. The fact that a patient has suffered injury while in the care of a healthcare provider does not mean that the healthcare provider committed medical negligence.

{**Comment**: The change in the locality requirement of DEL. CODE ANN. tit. 18, § 6801(7) (1999) is substantive in nature and may not be applied retroactively to claims of malpractice allegedly arising before July 7, 1998. *Tyler v. Dworkin*, Del. Super., C.A. No. 94C-01-054 Herlihy, J. (March 15, 1999)(Mem. Op.), *aff'd* Del. Supr., No. 156, 1999, Veasey J. (Dec. 2, 1999)(ORDER).}

Source:

DEL. CODE ANN. tit. 18, §§ 6801(7), 6852, 6853, 6854 (1999); *Corbitt v. Tatgari*, Del. Supr., 804 A.2d 1057, 1062-64 (2002); *Green v. Weiner*, Del. Supr., 766 A.2d 492, 494-95 (2001); *Balan v. Horner*, Del. Supr., 706 A.2d 518, 520-21 (1998)(noting physicians with different specialties may share concerns about the diagnosis and treatment of a common medical condition, and where there are concurrent fields of expertise, a common standard of care may be shared); *McKenzie v. Blasetto*, Del. Supr., 686 A.2d 160, 163 (1996)(application of a national standard of care may be used when that standard is found to be the same as the relevant Delaware standard); *Medical Ctr. of Delaware v. Lougheed*, Del. Supr., 661 A.2d 1055, 1057-59 (1995); *Greco v. University of Delaware*, Del. Supr., 619 A.2d 900, 903-04 (1993); *Baldwin v. Benge*, Del. Supr., 606 A.2d 64, 68 (1992); *Riggins v. Mauriello*, Del. Supr., 603 A.2d 827, 829-31 (1992); *Register v. Wilmington Med. Ctr.*, Del. Supr., 377 A.2d 8, 10 (1977); *Colemen v. Garrison*, Del. Supr., 349 A.2d 8, 10 (1975); *DiFillippo v. Preston,* Del. Supr., 173 A.2d 333, 336-37 (1961); *cf. Peters v. Gelb*, Del. Supr., 314 A.2d 901, 903-04 (1973)(expert witness who remained in good professional standing but had not actually practiced the particular procedure upon which his opinion was sought could be found by the court as not qualified to testify as an expert).

Sostre v. Swift, Del. Supr., 603 A.2d 809, 812 (1992); *Burhart v. Davies*, Del. Supr., 602 A.2d 56, 59-60 (1991), *cert. denied*, 112 S. Ct. 1946, 118 L.Ed.2d 551 (1992); *Russell v. Kanaga*, Del. Supr., 571 A.2d 724, 732 (1990); *Loftus v. Hayden*, Del. Supr., 391 A.2d 749 (1978); *Ewing v. Beck*, Del. Supr., 520 A.2d 653 (1987); *Larrimore v. Homeopathic Hosp. Ass'n of Delaware*, Del. Super., 176 A.2d 362, 367-68 (1961), *aff'd*, Del. Supr., 181 A.2d 573, 576-77 (1962)(standard of care for nurses, as for physicians, is a matter of applying the appropriate standard required of the nursing profession in the given circumstances).

7. HEALTHCARE - MALPRACTICE

INFORMED CONSENT

[***Plaintiff's name***] alleges that [***defendant's name***] committed medical malpractice by failing to obtain [***plaintiff's name***]'s informed consent to perform a [__describe treatment, surgery, procedure, etc.__]. "Informed consent" is a patient's consent to a procedure after the healthcare provider has explained both the nature of the proposed procedure or treatment and the risks and alternatives that a reasonable patient would want to know in deciding whether to undergo the procedure or treatment. The explanation must be reasonably understandable to a general lay audience.

You may consider whether the doctor supplied information to the extent customarily given to patients by other providers with similar training and experience in the same or similar healthcare communities at the time of the [__treatment, procedure, surgery, etc.__]. The doctor doesn't have to advise of hazards that are:

(1) inherent in a treatment, and

(2) are generally known to people of ordinary intelligence and awareness in a position similar to that of [***plaintiff's name***].

To prevail on this claim, [***plaintiff's name***] must prove by a preponderance of the evidence:

(1) that before the procedure, [***defendant's name***] failed to tell [***him/her***] about certain risks of the procedure or alternatives to it; and

(2) that a reasonable patient would have considered this information to be important in deciding whether to have the procedure; and

(3) that [***plaintiff's name***] has suffered injury as a proximate result of the procedure.

{**Comment**: The change in the locality requirement of DEL. CODE ANN. tit. 18, § 6801(7) (1999) is substantive in nature and may not be applied retroactively to claims of malpractice allegedly arising before July 7, 1998. *Tyler v. Dworkin*, Del. Super., C.A. No. 94C-01-054 Herlihy, J. (March 15, 1999)(Mem. Op.), *aff'd* Del. Supr., No. 156, 1999, Veasey J. (Dec. 2, 1999)(ORDER).}

Source:

DEL. CODE ANN. tit. 18, §§ 6801(6), 6811, 6812, 6852 (1999); *Russell v. Kanaga*, Del. Supr., 571 A.2d 724, 728-30 (1990)(admissibility of Medical Malpractice Review Panel findings); *Wagner v. Olmedo*, Del. Supr., 365 A.2d 643 (1976)(duties to disclose may vary according to accepted conventions of medical practice in community); *Moore v. Garcia*, Del. Super., C.A. No. 93C-03-026, Quillen, J. (June 2, 1995); *Oakes v. Gilday*, Del. Super., 351 A.2d 85, 87 (1976).

7. HEALTHCARE - MEDICAL NEGLIGENCE

INFORMED CONSENT

[***Plaintiff's name***] alleges that [***defendant's name***] committed medical negligence by failing to obtain [***plaintiff's name***]'s informed consent to perform a [__describe treatment, surgery, procedure, etc.__]. "Informed consent" is a patient's consent to a procedure after the healthcare provider has explained both the nature of the proposed procedure or treatment and the risks and alternatives that a reasonable patient would want to know in deciding whether to undergo the procedure or treatment. The explanation must be reasonably understandable to a general lay audience.

You may consider whether the doctor supplied information to the extent customarily given to patients by other healthcare providers in the same or similar field of medicine at the time of the [__treatment, procedure, surgery, etc.__]. The doctor doesn't have to advise of hazards that are:

(1) inherent in a treatment, and

(2) are generally known to people of ordinary intelligence and awareness in a position similar to that of [***plaintiff's name***].

To prevail on this claim, [***plaintiff's name***] must prove by a preponderance of the evidence:

(1) that before the procedure, [***defendant's name***] failed to tell [***him/her***] about certain risks of the procedure or alternatives to it; and

(2) that a reasonable patient would have considered this information to be important in deciding whether to have the procedure; and

(3) that [***plaintiff's name***] has suffered injury as a proximate result of the procedure.

{**Comment**: The change in the locality requirement of DEL. CODE ANN. tit. 18, § 6801(7) (1999) is substantive in nature and may not be applied retroactively to claims of malpractice allegedly arising before July 7, 1998. *Tyler v. Dworkin*, Del. Super., C.A. No. 94C-01-054 Herlihy, J. (March 15, 1999)(Mem. Op.), *aff'd* Del. Supr., No. 156, 1999, Veasey J. (Dec. 2, 1999)(ORDER).}

Source:

DEL. CODE ANN. tit. 18, §§ 6801(6), 6811, 6812, 6852 (1999); *Barriocanal v. Gibbs*, Del. Supr., 697 A.2d 1169, 1171-73 (1997); *Russell v. Kanaga*, Del. Supr., 571 A.2d 724, 728-30 (1990)(admissibility of Medical Malpractice Review Panel findings); *Wagner v. Olmedo*, Del. Supr., 365 A.2d 643 (1976)(duties to disclose may vary according to accepted conventions of medical practice in community); *Moore v. Garcia*, Del. Super., C.A. No. 93C-03-026, Quillen, J. (June 2, 1995); *Oakes v. Gilday*, Del. Super., 351 A.2d 85, 87 (1976).

7. HEALTHCARE - MALPRACTICE

AGENCY OF TREATING DOCTORS AND NURSES

[***Plaintiff's name***] seeks to recover damages from [***defendant Hospital's name***] on grounds that it is liable for the negligence of the [__doctors, nurses, etc.__] whose conduct is the subject of this lawsuit.

{*If agency is **not** contested, insert the following*}:

Because the medical personnel who treated [***plaintiff's name***] at [***defendant Hospital's name***] [__are / are not__] employees or agents of the [***defendant Hospital's name***], the hospital [__is / is not__] responsible for their acts.

{*If agency **is** contested, see Jury instr. No. 18.1 for additional language.*}

Source:

Greco v. University of Delaware, Del. Supr., 619 A.2d 900, 903-04 (1993); *Reyes v. Kent General Hosp., Inc.*, 487 A.2d 1142, 1144 (1984); *Timblin v. Kent Gen. Hosp.*, Del. Super., C.A. No. 90C-03-122, Quillen, J. (Oct. 4, 1995) (jury instruction).

7. HEALTHCARE - MALPRACTICE

DUTY OF PATIENTS TO DESCRIBE SYMPTOMS TRUTHFULLY

A patient must use reasonable care to truthfully describe [***his/her***] symptoms to a healthcare provider. If you find that [***patient's name***] did not reasonably and truthfully describe [***his/her***] symptoms to [***health care provider's name***], then you must find [***patient's name***] negligent.

{**Comment**: *The Delaware Supreme Court's holding in* Rochester *may be affected by the later adoption of comparative negligence, under which a healthcare provider might be found liable for negligent treatment despite the patient's contributory negligence.*}

Source:
Rochester v. Katalan, Del. Supr., 320 A.2d 704, 709 (1974).

7. HEALTHCARE - MALPRACTICE

OPINION OF MEDICAL MALPRACTICE REVIEW PANEL

Aspects of this case were first presented to a Medical Malpractice Review Panel, which rendered a written opinion. That opinion has been read to you and is evidence that [***defendant's name***] [__did / did not__] comply with the appropriate standard of care and that [***defendant's name***]'s conduct [__was / was not__] a factor in the resulting injuries.

You must determine whether [***plaintiff / defendant's name***] has effectively countered the panel's opinion and whether, in light of all the evidence presented by [***defendant's name***], [***plaintiff's name***] has met [***his/her***] burden of establishing by a preponderance of the evidence that there was malpractice and that this malpractice was a proximate cause of [***plaintiff's name***]'s injuries.

Source:

DEL. CODE ANN. tit. 18, § 6812 (1999); *Russell v. Kanaga*, Del. Supr., 571 A.2d 724, 728-30 (1990); *Whitfield v. Andersen*, Del. Supr., C.A. No. 328, 1976, Martin, J. (Nov. 18, 1986); *Robinson v. Mroz*, Del. Super., 433 A.2d 1051 (1981).

7. HEALTHCARE - MALPRACTICE

MEDICAL EXAMINER'S RECORDS

The Chief Medical Examiner's death certificate, autopsy report, and records have been introduced into evidence to explain how [***decedent's name***] died. When determining the cause of [***decedent's name***]'s death, you should consider these documents.

Source:

DEL. CODE ANN. tit. 29, § 4710(d) (1997); *Nanticoke Memorial Hosp., Inc. v. Uhde*, Del. Supr., 498 A.2d 1071, 1074 (1985).

8. PROFESSIONAL NEGLIGENCE (NON-MEDICAL)

DUTY OF A PROFESSIONAL

[***Plaintiff's name***] has alleged that [***defendant's name***] was negligent in [__identify the alleged negligent conduct__]. One who undertakes to render services in the practice of a profession or trade is always required to exercise the skill and knowledge normally held by members of that profession or trade in good standing in communities similar to this one.

If you find that [***defendant's name***] held [***himself/herself/itself***] out as having a particular degree of skill in [***his/her***] trade or profession, then the degree of skill required of [***defendant's name***] is that which [***he/she/it***] held [***his/her/itself***] out as having.

Source:
Tydings v. Lowenstein, Del. Supr., 505 A.2d 443, 445 (1986); *Seiler v. Levitz Furniture Co.*, Del. Supr., 367 A.2d 999, 1007-08 (1976); *Sweetman v. Strescon Indus., Inc.*, Del. Super., 389 A.2d 1319, 1324 (1978). *See also* RESTATEMENT (SECOND) OF TORTS § 299A.

8. PROFESSIONAL NEGLIGENCE (NON-MEDICAL)

{**Comment**: *See Jury Instr. Nos. 6.3 (healthcare providers) and 7.1 (professions and trades).*}

8. PROFESSIONAL NEGLIGENCE (NON-MEDICAL)

ATTORNEY MALPRACTICE

An attorney has the duty to possess and exercise the degree of learning and skill ordinarily held by an attorney practicing in this community under the same circumstances. A failure by [***defendant's name***] to conform to this duty is negligence and constitutes what is known as legal malpractice. [***Plaintiff's name***] must prove by a preponderance of the evidence that:

1) an attorney-client relationship existed between [***defendant's name***] and [***plaintiff's name***];

2) [***defendant's name***] negligently [__describe duty__]; and

3) such negligence proximately caused a loss to [***plaintiff's name***].

If you find that [***plaintiff's name***] has failed to prove any one of these elements, then you must find for [***defendant's name***].

{**Comment**: *Depending upon the facts of the case, an expert may be required to testify on the issue of negligence and proximate cause.*}

Source:

Brett v. Berkowitz, Del. Supr., 706 A.2d 509, 517-18 (1998)(holding out-of-state expert must be "well acquainted and thoroughly conversant" with standard of care required of attorneys in the State of Delaware); *Thompson v. D'Angelo*, Del. Supr., 320 A.2d 729, 734 (1974); *Vredenburgh v. Jones*, Del. Ch., 349 A.2d 22, 38-40 (1975)(self-dealing by fiduciary); *Robinson v. Prickett, Ward, Burt & Sanders*, Del. Super., C.A. No. 1445, 1975, Walsh, J. (Apr. 29, 1977); *Pusey v. Reed*, Del. Super., 258 A.2d 460, 461 (1969).

9. PRODUCTS LIABILITY

NEGLIGENT MANUFACTURE OF A DEFECTIVE PRODUCT

A manufacturer of a product such as [__identify product__] owes a duty to the public and to any users of the product to exercise reasonable care, skill, and diligence in making the product.

A manufacturer is negligent if it fails to exercise reasonable care in making its product so that the product contains a manufacturing defect when placed into the stream of commerce. The mere fact that an accident occurs or that the product is defective does not mean that the manufacturer was negligent. The test is whether [***defendant's name***] used the reasonable skill, care, and diligence of an ordinarily prudent manufacturer in making the product.

Source:

Nacci v. Volkswagen of America, Inc., Del. Super., 325 A.2d 617, 620 (1974). *See also Cline v. Prowler Indus. of Maryland, Inc.*, Del. Supr., 418 A.2d 968 (1980)(declining to adopt theory of strict liability per section 402A of the *Restatement* for sales of goods, due to preeminence of UCC).

9. PRODUCTS LIABILITY

MANUFACTURER'S COMPLIANCE WITH SPECIFICATIONS

The manufacturer of a product built in accordance with another entity's plans and specifications is not liable for damages caused by a defect in the plans unless they are so obviously dangerous that no reasonable [__person / manufacturer / fabricator__] would follow them.

Source:

Castaldo v. Pittsburgh-Des Moines Steel Company, Inc., Del. Supr., 376 A.2d 88, 90 (1977). *See also* RESTATEMENT (SECOND) OF TORTS § 399 (1965 and App.).

9. PRODUCTS LIABILITY

MANUFACTURER / SELLER OF CONSUMER GOODS -- DUTY TO WARN

A [__manufacturer / seller__] must warn about the risks of its product when it knows, or should know, that the product involves a risk of harm when used for the purpose supplied. The standard for determining the manufacturer's duty to warn is whatever a reasonably prudent manufacturer engaged in the same activity would have done. The duty extends not only to the immediate purchaser but also to anyone else who might ordinarily have a risk of harm.

This duty to warn exists only when the [__manufacturer / seller__] has reason to believe that the product's users are not aware of the risk of harm. There is no duty to warn when the user has actual knowledge of the danger. A manufacturer is not required to warn of obvious risks that are generally known and recognized.

Source:

In re Asbestos Litigation, Del. Supr., 799 A.2d 1151, 1152-53 (2002); *In re Asbestos Litigation (Mergenthaler)*, Del. Super., 542 A.2d 1205, 1208. 1212 (1986)(adopting sophisticated purchaser defense); *Graham v. Pittsburgh Corning Corp.*, Del. Super., 593 A.2d 567, 568 (1990); *Wilhelm v. Globe Solvent Co.*, Del. Super., 373 A.2d 218 (1977), rev'd on other grounds, 411 A.2d 611 (1979). *See also* RESTATEMENT (SECOND) OF TORTS § 388 (1965); PROSSER & KEETON ON TORTS §§ 95A, 96, 99.

9. PRODUCTS LIABILITY

SOPHISTICATED PURCHASER

The duty to warn does not apply when the manufacturer supplies a product to a "sophisticated purchaser." A sophisticated purchaser is one who the manufacturer knows or reasonably believes is aware of the risk of danger. There is no duty to warn the purchaser or its employees about the risks of harm unless the manufacturer knows or has reason to believe that the required warning will fail to reach the employees, the eventual users of the product.

Source:

See In re Asbestos Litigation, Del. Supr., 799 A.2d 1151, 1153 n.2 (2002); *In re Asbestos Litigation (Mergenthaler)*, Del. Super., 542 A.2d 1205, 1208-1212 (1986) (adopting the "sophisticated purchaser" defense); *Wilhelm v. Globe Solvent*, Del. Super., 373 A.2d 218 (1977), *rev'd on other grounds*, 411 A.2d 611 (1979). *See also* RESTATEMENT (SECOND) OF TORTS § 388 (1965 and App.); PROSSER & KEETON ON TORTS §§ 95A, 96, 99.

9. PRODUCTS LIABILITY

NEGLIGENT DESIGN OF A PRODUCT

A manufacturer owes a duty to use reasonable care, skill, and diligence in designing its product so as to minimize all foreseeable risks. A manufacturer must reasonably anticipate the environment in which the product is normally used and must design the product to minimize foreseeable risks of harm that may result from using the product in such an environment.

To determine whether [***defendant's name***] acted reasonably in designing [__identify product__], you may consider:

- the purpose of the product;
- its usefulness and desirability;
- the likelihood of injury from its ordinary use;
- the nature and severity of likely injury;
- the obviousness of danger in the ordinary use of the product;
- the ability to eliminate the danger without making the product less useful, or creating other risks to the user;
- the availability of a feasible alternative design;
- the cost of any alternative design; and
- the likelihood of consumer acceptance of a product with an alternative design.

Although a manufacturer has a duty to exercise reasonable care, the manufacturer is not required to design a product that is foolproof or incapable of producing injury.

To prove that [***defendant's name***] was negligent, [***plaintiff's name***] must prove by a preponderance of the evidence that [***defendant's name***] failed to use reasonable care, skill, and diligence in designing its product.

{**Comment**: *Although a factor may be listed above, it does not necessarily mean that it should be used in every charge on negligent design. Each of the factors should be considered on a case by case basis in accordance with the evidence presented at trial.*}

Source:

Brower v. Metal Industries, Inc., Del. Supr., 719 A.2d 941, 944 (1998); Massey-Ferguson *v. Wells*, Del. Supr., 383 A.2d 640, 642 (1978) (adopting RESTATEMENT (SECOND) OF TORTS §§ 395, 398 (1965 & App.)); *Nacci v. Volkswagon of American, Inc.,* Del. Super., 325 A.2d 617, 620 (1974).

9. PRODUCTS LIABILITY

SELLER'S DUTY TO INSPECT

Generally, a seller is under no duty to inspect the products it sells.

To find a seller negligent, you must make two findings:

(1) you must find that the manufacturer was negligent in the [__design / manufacture__] of the product.

(2) you must find that [***seller's name***] either had actual knowledge of a [negligent design / manufacturing defect] in the product or had reason to believe that the product was negligently [__designed / manufactured__].

Source:

Behringer v. William Gretz Brewing Co., Del. Super., 169 A.2d 249, 253 (1961).

9. PRODUCTS LIABILITY

SEALED-CONTAINER DEFENSE

A seller is not liable for defects in a product that is received by it in a sealed container and sold in an unaltered form. This defense does not apply, however, if the seller has knowledge of the defects, or if the seller reasonably could have discovered the defects while the product was in its possession. The burden of proving this defense is on [***seller's name***].

A seller is an individual or entity, other than the manufacturer, who is regularly engaged in the wholesale, retail, or distribution of a product. [Sellers include a lessor or bailor regularly engaged in the business of the lease or bailment of the product.]

{**Comment**: *Other subsections of* DEL. CODE ANN. tit. 18, § 7001 (1999) *disallow the "sealed container defense" under certain circumstances and should be reviewed to determine their applicability to each individual case.*}

Source:
DEL. CODE ANN. tit. 18, § 7001 (1999); *Behringer v. William Gretz Brewing Co.*, Del. Super., 169 A.2d 249, 253 (1961).

9. PRODUCTS LIABILITY

STRICT LIABILITY - LEASED PROPERTY

One who leases a product that is in defective condition and is unreasonably dangerous to the user of the product, or to the user's property, is liable without proof of negligence if:

(a) the lessor is engaged in the business of leasing such products; and

(b) the product is expected to and does reach the user without substantial change in its condition when leased.

A substantial change occurs when the leased product is changed by someone other than the lessor in a way that the lessor could not have reasonably foreseen, given the product's intended use.

This liability applies even if the lessor exercised all possible care in preparing and leasing the product.

{**Comment**: *This instruction is based on language of* Restatement (Second) of Torts § 402A (1965) *and* Martin v. Ryder Truck Rental, Inc*., Del. Supr., 353 A.2d 581 (1976).*}

Source:

DEL. CODE ANN. tit. 6, §§ 2A-210 to 2A-216 (1999)(adopting product liability provisions of Article 2A of the UCC). *See also Martin v. Ryder Truck Rental, Inc.*, Del. Supr., 353 A.2d 581, 586 (1976)(adopting theory of strict liability, as articulated in section 402A of the *Restatement (Second) of Torts,* with regard to the lease or bailment of goods); *accord Golt by Golt v. Sports Complex, Inc.*, Del. Super., 644 A.2d 989, 991-92 (1994). The language of Article 2A (lease of goods) mirrors that of Article 2 (sale of goods) and would imply that under previous Delaware common law the theory of strict liability has not been adopted by Article 2A. *See, e.g., Cline v. Prowler Indus. of Maryland, Inc.*, Del. Supr., 418 A.2d 968 (1980). The Delaware drafters of Article 2A indicated, however, that the holding of *Martin v. Ryder Truck Rentals,* that adopted the common law theory of strict liability for leased or bailed goods, would not be abrogated by the legislature's enactment of Article 2A. *See* 68 Del. Laws 1994, synopsis (drafter's comments).

9. PRODUCTS LIABILITY

MAGNITUDE OF THE RISK OF HARM

The degree of care of a manufacturer depends on how great the risk is. The magnitude of the risk is determined not only by the chance that harm may result but also by the serious or trivial nature of the harm that is likely to result. So, a manufacturer's duty exists even when the probability of danger is very small, as long as the potential injury is great.

{**Comment**: *This instruction is intended for use only in the rare case where the risk of harm is very small, but the consequences are very great.*}

Source:

Graham *v. Pittsburgh Corning Corp.*, Del. Super., 593 A.2d 567, 568 (1990)(citing AMERICAN LAW OF PRODUCTS LIABILITY 3d § 32:3 (1987)); *Delmarva Power & Light Co. v. Burrows*, Del. Supr., 435 A.2d 716 (1981).

9. PRODUCTS LIABILITY

COMPLIANCE WITH GOVERNMENT REGULATIONS OR INDUSTRY STANDARDS DOES NOT PRECLUDE A FINDING OF NEGLIGENCE

Evidence that [***defendant's name***] complied with government regulations or industry standards does not prove that [***defendant's name***] has met its standard of care, nor does it prevent you from finding in favor of [***plaintiff's name***]. Compliance with governmental or industry standards is some evidence of due care. But governmental or industry standards do not necessarily set the standard in a negligence case because an entire industry may have lagged behind a standard of reasonable care.

Source:

See Duphily v. Delaware Elec. Co-op, Inc., Del. Supr., 662 A.2d 821, 836 (1995)(contributory negligence); *Slover v. Fabtek, Inc.*, Del. Super., 517 A.2d 293, 295 (1986); *Delmarva Power & Light Co. v. Burrows*, Del. Super., 435 A.2d 716 (1981). *See also Blueflame Gas, Inc. v. Van Hoose*, Colo. Supr., 679 P.2d 579 (1984); AM. LAW PROD. LIAB. 3d § 4:30 (1987).

9. PRODUCTS LIABILITY

MISUSE OF PRODUCT

[***Defendant's name***] claims that [***plaintiff's name***] misused [__describe product__]. If you find that [__describe alleged misuse of product__] was not a use reasonably foreseen by the manufacturer, and if you find that this misuse was an intervening or superseding cause of [***plaintiff's name***]'s injuries, you must find for [***defendant's name***].

{**Comment**: *See Jury Instr. No. 10.3 "Superseding Cause."*}

Source:

DEL. CODE ANN. tit. 6, § 2-314(c) (1999)(warranty applies only to "*ordinary* purposes for which such goods are used")(emphasis added). *See also Southern States Coop v. Townsend Grain & Feed Co.*, Bankr. D. Del., 163 Bankr. 709 (1994)(general discussion of application of UCC warranties).

9. PRODUCTS LIABILITY

EXPRESS WARRANTY

[***Plaintiff's name***] has alleged that [***defendant's name***] made an express warranty that [***his/her/its***] product was [__identify promise, description, etc.__]. An express warranty is created in one of three ways:

(1) if [***defendant's name***] made a promise or factual representation about the product to [***buyer's name***] and that promise or representation became a basis of the parties' bargain;

(2) if [***defendant's name***] described the product in a certain manner to [***buyer's name***], and that description became a basis of the parties' bargain; or

(3) if [***defendant's name***] offered a sample or model of the product to [***buyer's name***], and that sample or model became a basis of the parties' bargain.

No formal words are necessary to create a warranty. Nor does [***defendant's name***] have to intend to make a warranty.

If you find that any one of these three circumstances existed in this case, then you must find that [***defendant's name***] warranted that the product would conform to the promise, description, or model.

{**Comment**: *This instruction may be used whether the goods are leased or sold.*}

Source:

DEL. CODE ANN. tit. 6, §§ 2-313, 2A-210 (1999); *Bell Sports, Inc. v. Yarusso*, Del. Supr., 759 A.2d 582, 592 (2000); *Pack & Process, Inc. v. Celotex Corp.*, Del. Super., 503 A.2d 646, 658-69 (1985); *Southern States Coop. v. Townsend Grain & Feed Co.*, D. Del., 163 Bankr. 709 (1994).

9. PRODUCTS LIABILITY

CREATION OF AN EXPRESS WARRANTY - AFTER SALE

An express warranty may be created after a sale if the warranty language used after the contract negotiation is a valid modification. This means that if a written agreement says that any modifications to it must also be in writing, then modifications are valid only if they're in writing. But if the original agreement was not in writing, or if the agreement did not require that modifications be in writing, then oral modifications may suffice. No additional consideration for a modification is necessary.

Source:

DEL. CODE ANN. tit. 6, § 2-313 cmt. 1 (1999); DEL. CODE ANN. tit. 6, § 2-209 (1999); *Pack & Process, Inc. v. Celotex Corp.*, Del Super, 503 A.2d 646, 659 (1985).

9. PRODUCTS LIABILITY

STATEMENT OF OPINION

If you find that [***seller's name***] merely affirmed the value of the goods, or merely made a statement purporting to be [***his/her/its***] opinion or commendation of the product, then you should not find that a warranty was created.

Source:
DEL. CODE ANN. tit. 6, § 2-313(2) (1999); *Pack & Process, Inc. v. Celotex Corp.*, Del. Super., 503 A.2d 646, 657-58 (1985).

REVOCATION OF ACCEPTANCE OF GOODS

One of the buyer's remedies for breach of express warranty is known as "revocation of acceptance." To effectively revoke [his/her/its] acceptance of the goods, [***buyer's name***] must establish all of the following elements:

(1) when the product was delivered, it had a [non-conformity / defect] that could not reasonably have been discovered by [***buyer's name***];

(2) the [non-conformity / defect] substantially impaired the value of the product to [***buyer's name***], in light of [his/her/its] needs and circumstances and considering whether a reasonable person would consider the value of the product to be impaired under these circumstances;

(3) [***Buyer's name***] notified either [***defendant's name***] or one of [his/her/its] agentss that [he/she/it] did not want to keep the product;

(4) the notification occurred within a reasonable time after [***buyer's name***] discovered or should have discovered the [non-conformity / defect]; and

(5) the revocation occurred before there was any substantial change in the product's condition that was not caused by the [non-conformity / defect]. In this regard, a buyer may work with a seller in attempting to have the [non-conformity / defect] repaired but may then timely revoke acceptance if the [non-conformity / defect] is not satisfactorily cured.

If you find that [***buyer's name***] has established all of the above elements by a preponderance of the evidence, then you must find that [***buyer's name***] effectively revoked [his/her/its] acceptance of the product.

Source:

DEL. CODE ANN. tit. 6, §§ 2-314, 2-608 (1999); *Mercedes-Benz of North America, Inc. v. Norman Gershman's Things to Wear, Inc.*, Del. Supr., 596 A.2d 1358, 1362-63 (1991); *Freedman v. Chrysler Corp.*, Del. Super., 564 A.2d 691, 697-98, 700 (1989); *Ed Fine Oldsmobile, Inc. v. Kniseley*, Del. Super., 319 A.2d 33, 37 (1974). *See also* WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 8-4 (3d ed. 1988).

9. PRODUCTS LIABILITY

IMPLIED WARRANTY OF MERCHANTABILITY

In every contract for the sale of goods, there is an implied promise that the goods are merchantable. In order to be merchantable, the goods must:

{*Instruct on each element as applicable*}

- pass without objection in the trade under the contract description; and
- if they're fungible goods, (goods that are commercially interchangeable) be of fair average quality within their contract description; and
- be fit for the ordinary purposes for which the goods are used; and
- be, within the variations permitted by the contract, of even kind, quality, and quantity within each unit and among all units involved; and
- be adequately contained, packaged, and labeled as the contract requires; and
- conform to the factual promises or affirmations, if any, made on the container or label.

If you find that any one of the above elements did not exist for the goods in this contract, then you must find that [***defendant's name***] breached its implied promise that the goods would be merchantable.

{**Comment**: *The implied warranty of merchantability applies only to the sale or lease of goods. This implied warranty does not apply to service contracts or to the sale or lease of real estate. An express warranty, on the other hand, may apply to any contract and is legally binding to the full extent of its terms.*}

Source:

DEL. CODE ANN. tit. 6, § 2-314 (1999); *Reybold Group, Inc. v. Chemprobe Technologies, Inc.*, Del. Supr. 721 A.2d 1267, 1269 (1998)(plaintiff must prove defect); *Johnson v. Hockessin Tractor, Inc.*, Del. Supr., 420 A.2d 154, 157 (1980)(holding breach of warranty is necessarily a breach of the sales contract). *See also* 6 *Del. C.* §§ 2A-210 to 2A-216 (implied warranties include goods offered in leases or bailments); *Neilson Bus. Equip. Ctr., Inc. v. Monteleone*, Del. Supr., 524 A.2d 1172, 1174-75 (1987).

Southern States Coop. v. Townsend Grain & Feed Co., D. Del., 163 Bankr. 709 (1994); *Miley v. Harmony Mill Ltd. Partnership*, D. Del., 803 F. Supp. 965 (1992)(implied warranties do not apply to real estate lease agreements); *Grigsby v. Crown Cork & Seal Co.*, D. Del., 574 F. Supp. 128 (1983)(implied warranties do not apply to service contracts); *Cropper v. Rego Distrib. Ctr., Inc.*, D. Del., 542 F. Supp. 1142, 1153-54 (1982)(discussing the definition of "merchant in goods of that kind").

9. PRODUCTS LIABILITY

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

[***Plaintiff/buyer's name***] has alleged that [***defendant/seller's name***] has breached an implied promise that the product in question was fit for a particular purpose. If you find that when the contract was formed [***defendant/seller's name***] should have known about a particular purpose for which [***plaintiff/buyer's name***] was going to use the goods and that [***plaintiff/buyer's name***] was relying on [his/her/its] skill or judgment to select or furnish goods suitable for that purpose, then [***defendant/seller's name***] has impliedly warranted that the goods would be suitable for that purpose.

{**Comment**: *The implied warranty of fitness for a particular purpose applies only to the sale or lease of goods. This implied warranty does not apply to service contracts or to the sale or lease of real estate. An express warranty, on the other hand, may apply to any contract and is legally binding to the full extent of its terms.*}

Source:

DEL. CODE ANN. tit. 6, § 2-315 (1999); *Neilson Bus. Equip. Ctr., Inc. v. Monteleone*, Del. Supr., 524 A.2d 1172, 1175-76 (1987). *See also* 6 *Del. C.* §§ 2A-210 to 2A-216 (implied warranties include goods offered in leases or bailments); *Gulko v. General Motors Corp.*, Del. Super., C.A. No. 94C-12-285, Del Pesco, J. (Sept. 10, 1997); *Southern States Coop. v. Townsend Grain & Feed Co.*, D. Del., 163 Bankr. 709 (1994); *Miley v. Harmony Mill Ltd. Partnership*, D. Del., 803 F. Supp. 965 (1992)(implied warranties do not apply to real estate lease agreements); *Grigsby v. Crown Cork & Seal Co.*, D. Del., 574 F. Supp. 128 (1983)(implied warranties do not apply to service contracts); *ICI Americas, Inc. v. Martin-Marietta Corp.*, D. Del., 368 F. Supp. 1148 (1974).

9. PRODUCTS LIABILITY

SCOPE OF WARRANTY - SECONDARY USERS

A seller's warranty, whether express or implied, extends to any person who might reasonably be expected to use or be affected by the goods and who is injured by a breach of the warranty.

A secondary purchaser or user of a product is subject to the same warranties and the same disclaimers, modifications, or remedy-limitation clauses that were part of the underlying sales agreement between the original buyer and the seller.

If you find that [__describe the warranty, disclaimer, modification, or remedy limitation__] was a part of the original sale of the product, then you must apply the [__describe the warranty, disclaimer, modification, or remedy limitation__] to [***plaintiff's name***]'s claim under [__describe basis for claim__].

Source:

DEL. CODE ANN. tit. 6, §§ 2-316, 2-318, 2-719 (1999); *Franchetti v. Intercole Automation, Inc.*, D. Del., 523 F. Supp. 454 (1981); *Lecates v. Hertrich Pontiac Buick Co.*, Del. Super., 515 A.2d 163, 166-67 (1986).

9. PRODUCTS LIABILITY

EXCLUSION OR MODIFICATION OF EXPRESS WARRANTIES

If you find that [***seller's name***] has used words or conduct tending to create an express warranty and has also used words or conduct tending to exclude or limit the warranty, you must try to interpret them as being consistent with each other. But if you find that they cannot reasonably be reconciled, you must disregard the words or conduct tending to exclude or limit the warranty.

Source:

DEL. CODE ANN. tit. 6, § 2-316(1) and (2) (1999); *Bell Sports, Inc. v. Yarusso*, Del. Supr., 759 A.2d 582, 593 (2000); *Lecates v. Hertrich Pontiac Buick Co.*, Del. Super., 515 A.2d 163, 167-71 (1986).

9. PRODUCTS LIABILITY

EXCLUSION OF IMPLIED WARRANTIES - "AS IS"

A seller such as [***seller's name***] may generally prevent the creation of an implied warranty by making clear to the buyer that the goods are sold "as is" or "with all faults," or by other language that by common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

If the buyer, before entering into the contract or accepting or purchasing the goods, has examined the goods fully, or has refused to examine the goods upon the seller's demand, there is no implied warranty for defects that an examination should have revealed.

An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade. [__*Define these terms if necessary.*__]

Implied warranties are not disclaimed where circumstances indicate otherwise. If the seller's words or conduct are ambiguous or conflict with an attempted exclusion of warranties, then the attempted exclusion is not effective.

You must decide whether the implied warranty claimed by [***plaintiff's name***] has been excluded in any manner by [***defendant's name***].

{**Comment**: *A seller may exclude or modify the implied warranty of merchantability, or any part of it, by using the word "merchantability" and, in the case of a writing, the language using the word merchantability must be conspicuous. All implied warranties of fitness for a particular purpose may be excluded by language which states "there are no warranties which extend beyond the description on the face hereof." The exclusion or modification of the implied warranty of merchantability or the exclusion of an implied warranty of fitness for a particular purpose is a matter of law for the court to decide.*}

Source:

DEL. CODE ANN. tit. 6, § 2-316(3)(a)-(c) (1999); *Lecates v. Hertrich Pontiac Buick Co.*, Del. Super., 515 A.2d 163, 167-69 (1986); *Falcon Tankers, Inc. v. Litton Sys. Inc.*, Del. Super., 300 A.2d 231, 238-39 (1972)(applying New York law).

9. PRODUCTS LIABILITY

EXCLUSION OF IMPLIED WARRANTY OF MERCHANTABILITY

{**Comment**: *A seller may exclude or modify the implied warranty of merchantability, or any part of it, by using the word "merchantability" and, in the case of a writing, the language using the word merchantability must be conspicuous. The exclusion or modification of the implied warranty of merchantability in this manner is a matter of law for the court to decide.*}

Source:

DEL. CODE ANN. tit. 6, § 2-316(2) (1999).

9. PRODUCTS LIABILITY

EXCLUSION OF WARRANTY FOR FITNESS FOR A PARTICULAR PURPOSE

{**Comment**: *All implied warranties of fitness for a particular purpose may be excluded by language that states: "there are no warranties which extend beyond the description on the face hereof." The exclusion of an implied warranty of fitness for a particular purpose in this manner is a matter of law for the court to decide.*}

Source:

DEL. CODE ANN. tit. 6, § 2-316(2) (1999).

9. PRODUCTS LIABILITY

USE OF PRODUCT AFTER DEFECT IS KNOWN TO PLAINTIFF

If a buyer of a product, after accepting it, discovers a [non-conformity / defect] that substantially impairs its value, the buyer may seek relief by promptly revoking acceptance of the goods and demanding either a refund of the purchase price or the prompt cure of the defect by replacement or repair. But if the buyer continues to use the product without giving the seller reasonable opportunity to cure the [non-conformity / defect] or refund the purchase price, then the buyer may not revoke acceptance of the product.

A buyer is permitted, however, to work with a seller in attempting to have the [non-conformity / defect] repaired but may still revoke acceptance within a reasonable time if there is not a satisfactory cure of the [non-conformity / defect]. You must determine if acceptance has been revoked within a reasonable time under the circumstances.

If you find that [***buyer's name***] continued to use [__describe the product__] and did not give [***seller's name***] adequate opportunity to repair or replace the [__describe the product__], then you must return a verdict for [***seller's name***]. If you find that the [non-conformity / defect] in [__describe the product__] substantially impaired its value to [***buyer's name***] and that [***buyer's name***] gave [***seller's name***] reasonable opportunity to repair or replace [__describe the product__] or return the purchase price before [***buyer's name***] continued to use it, then you must return a verdict for [***buyer's name***].

The value of a product is substantially impaired when a [non-conformity / defect] substantially interferes with the normal operation or enjoyment of a product or the normal

purpose for which it was bought. Mere annoyance over minor [non-conformities / defects] that do not inhibit the normal, intended use of the product is not a substantial impairment. But the cumulative effect of minor defects, none of which by itself would substantially impair value, can be sufficient cause to justify revocation of acceptance.

Source:

DEL. CODE ANN. tit. 6, §§ 2-603, 2-608 (1999); *Norm Gershman's Things to Wear, Inc. v. Mercedes Benz of North America*, Del. Supr., 596 A.2d 1358, 1361-64 (1991); *Freedman v. Chrysler Corp.*, Del. Super., 564 A.2d 691, 700 (1989); *Olmstead v. General Motors Corp.*, Del. Super., 500 A.2d 615 (1985); *Ed Fine Oldsmobile, Inc.*, Del. Super., 319 A.2d 33, 37-38 (1974); *Waltz v. Chevrolet Motor Div.*, Del. Super., 307 A.2d 815, 815-16 (1973); *Towe v. Justis Bros.*, Del. Super., 290 A.2d 657, 658-59 (1972). *See* ROSMARIN & SHELDON, SALES OF GOODS AND SERVICES § 27.32.2.

9. PRODUCTS LIABILITY

REQUIREMENT OF NOTIFICATION OF BREACH -- COMMERCIAL SALES

To recover for a breach of warranty, [***buyer's name***] must notify [***seller's name***] of the breach within a reasonable time after [***he/she/it***] discovers or should have discovered the breach. A buyer notifies a seller by taking reasonable steps to inform the seller under ordinary circumstances, regardless of whether the seller actually comes to know of the alleged breach. No particular words or forms are required. Notice need not be written. Conversations, conferences, and correspondence that call [***seller's name***]'s attention to the defect in the product can constitute notice of [***seller's name***]'s breach.

Source:

DEL. CODE ANN. tit. 6, § 1-201(25)-(27), 2-607 cmt. 4, 2-608 (1999); *Waltz v. Chevrolet Motor Div.*, Del. Super., 307 A.2d 815, 815-16 (1973); *Towe v. Justis Bros.*, Del. Super., 290 A.2d 657, 658-59 (1972). *See* Official Comment 4 to DEL. CODE ANN., tit. 6 § 2-607 (1999) (No particular words are required to give notice. The notice must merely be sufficient to let the seller know that the transaction is still troublesome and must be watched); ROSMARIN & SHELDON, SALES OF GOODS & SERVICES § 30.5.

9. PRODUCTS LIABILITY

AUTOMOBILE "LEMON LAW"

[***Plaintiff's name***] alleges that [***manufacturer's name***], as the manufacturer of [his/her/its] car, violated the Automobile Warranties Act, popularly known as the "Lemon Law."

This law provides:

> "If a new automobile does not conform to the manufacturer's express warranty, and the consumer reports the nonconformity to the manufacturer or its . . . dealer during . . . the period of one year following the date of original delivery of an automobile to the consumer, . . . the manufacturer shall make, or arrange with its dealer . . . to make, within a reasonable period of time, all repairs necessary to conform the new automobile to the warranty, notwithstanding that the repairs or corrections are made after the . . . one year period.

A "nonconformity" is a defect or condition that substantially impairs the use, value, or safety of an automobile. The plaintiff may establish a nonconformity by showing within the first year after the date of original delivery that:

(1) substantially the same defect or condition has been subject to repair four or more times; or

(2) the automobile was out of service by reason of any repair for a total of more than 30 calendar days.

In this regard, if the consumer presents the car to the dealer, it is "subject to repair" even if the dealer cannot verify that anything is wrong and thus does not attempt to make repairs. If the nonconformity or defect does not substantially impair the use, value, or safety of the vehicle, the buyer cannot recover. On this last point, [***manufacturer's name***] has the burden of proof.

If you find there has been a violation of the Lemon Law, you should return a verdict in favor of [***plaintiff's name***] and against [***manufacturer's name***].

Source:

DEL. CODE ANN. tit. 6, § 5001 *et. seq.* (1999); *Norman Gershman's Things To Wear, Inc. v. Mercedes-Benz of North America, Inc.*, Del. Super., 558 A.2d 1066 (1989)(holding only manufacturer liable for repairs and not the dealer). *See also Chimell v. Friendly Ford-Mercury of Jonesville, Inc.*, Wis. Ct. App., 424 N.W.2d 747 (1988).

10. SPECIAL DOCTRINES OF TORT LAW

STANDARD OF CARE - MINORS

A minor isn't held to the same standard of care as an adult. A minor must exercise the degree of care that is ordinarily exercised under similar circumstances by minors of similar age, maturity, intelligence and experience. You must determine whether, under the circumstances, [***minor's name***]'s conduct was what might have been reasonably expected of a minor of the same age, maturity, intelligence, and experience.

Source:

Moffitt v. Carroll, Del. Supr., 640 A.2d 169, 173 (1994); *Beggs v. Wilson*, Del. Supr., 272 A.2d 713 (1970); *House v. Lauritzen*, Del. Supr., 237 A.2d 134, 136 (1967); *Pokoyski v. McDermott*, Del. Supr., 167 A.2d 742 (1961); *Audet v. Convery*, Del. Super., 187 A.2d 412 (1963). *See also* RESTATEMENT (SECOND) OF TORTS § 283A.

10. SPECIAL DOCTRINES OF TORT LAW

STANDARD OF CARE - DISABLED PERSON

A person with a mental or physical disability must exercise the amount of care that a person of ordinary prudence with a similar disability would use under similar circumstances.

Source:

Coker v. McDonald's Corp., Del. Super., 537 A.2d 549, 550-51 (1987)(blind persons); *cf. Lutzkovitz v. Murray*, Del. Supr., 339 A.2d 64, 66-67 (1975)(ordinary standard of care applies to person with disability who knowingly undertakes activity potentially hazardous to others). *See also* RESTATEMENT (SECOND) OF TORTS §§ 283 (B) & (C).

10. SPECIAL DOCTRINES OF TORT LAW

RES IPSA LOQUITUR

[***Plaintiff's name***] has alleged that [***defendant's name***] was negligent, and that this negligence caused [__describe accident/injury__]. On the issue of negligence, one of the questions for you to decide is whether the [__describe accident/injury__] occurred under the following conditions:

(1) the accident is the sort that does not ordinarily happen if those who have management and control use proper care;

(2) the evidence excludes [***plaintiff's name***]'s own conduct as a cause of the accident;

(3) the thing that caused the injury was under the control, although not necessarily the exclusive control, of [***defendant's name***] or [***his/her/its***] servants when the negligence occurred; and

(4) the facts are strong enough to suggest negligence and call for an explanation or rebuttal from [***defendant's name***].

If, and only if, you find that all these conditions exist, you may conclude that a cause of the occurrence was some negligent conduct by the defendant.

Source:

D.R.E. 304; *Lacy v. G.D. Searle & Co.*, Del. Super., 484 A.2d 527, 529-30 (1984); *Dillon v. General Motors Corp.*, Del. Super., 315 A.2d 732, 737 (1974), *aff'd*, Del. Supr., 367 A.2d 1020 (1976).

ASSUMPTION OF RISK (Primary)

[***Defendant's name***] has alleged that [***plaintiff's name***] voluntarily assumed a known risk when [***he/she/it***] [__describe alleged risk assumed__]. A person who chooses to take a risk, and who understands or should understand the danger associated with that risk, cannot recover for damages that result.

[***Defendant's name***] must prove by a preponderance of the evidence that [***plaintiff's name***] voluntarily assumed [__describe alleged risk of injury__] in this case. If you find that [***plaintiff's name***] assumed this risk of injury, then your verdict must be for [***defendant's name***].

{**Comment**: *This instruction contemplates what is referred to as "primary" assumption of the risk.*}

Source:

See Furek v. University of Delaware, Del. Supr., 594 A.2d 506, 523 (1991)(stating that defendant has to prove that plaintiff was contributory negligent–the plaintiff's negligence couldn't be assumed solely because he voluntarily participated in fraternity hazing); *North v. Owens-Corning Fiberglas Corp.*, Del. Supr., 704 A.2d 835, 839 (1997)(holding jury should focus on assumption of the risk only after finding liability on part of defendant); *Koutafaris v. Dick*, Del. Supr., 604 A.2d 390, 397-98 (1992); *Fell v. Zimath*, Del. Super., 575 A.2d 267, 267-68 (1989); *Yankanwich v. Wharton*, Del. Supr., 460 A.2d 1326, 1330 (1983); *Patton v. Simone*, Del. Super., 626 A.2d 844, 852-53 (1992); *cf. Taylor v. Young Life*, Del. Super., C.A. No. 93C-07-27, Del Pesco, J. (June 9, 1995)(risk of injury assumed by participants in sporting or cheerleading activities unless caused by intentional or willful and wanton disregard for participants' safety); *James v. Laurel Sch. Dist.*, Del. Super., C.A. No. 92C-05-031, 1993 WL 81266, Lee, J., (Mar. 3, 1993)(same), *aff'd*, Del. Supr., 633 A.2d 370 (1993)(Order). *See also* MARYLAND CIVIL PATTERN JURY INSTRUCTIONS 19:11 (2d ed. 1984); PROSSER & KEETON ON TORTS § 68 (5th ed. 1984).

10. SPECIAL DOCTRINES OF TORT LAW

ASSUMPTION OF THE RISK (Secondary)

[Subsumed Within the Principles of Comparative Negligence, 10 *Del. C.* § 8132]

{**Comment**: *This instruction originally contemplated what is referred to as "secondary" assumption of the risk. It should be replaced with a comparative negligence charge.*}

Source:

Koutafaris v. Dick, Del. Supr., 604 A.2d 390, 397-98 (1992); *Fell v. Zimath*, Del. Super., 575 A.2d 267 (1989). *See also* PROSSER & KEETON ON TORTS § 68 (5th ed. 1984).

10. SPECIAL DOCTRINES OF TORT LAW

ACTIONS TAKEN IN EMERGENCY - General

When a person is involved in an emergency situation not of [***his/her***] own making and not created by [***his/her***] own negligence, that person is entitled to act as a reasonably prudent person would under similar circumstances.

Therefore, if you find that [***person's name***] was confronted by an emergency situation when [__describe emergency__], you should review [***his/her***] conduct in light of what a reasonably prudent person would have done under those circumstances.

ACTIONS TAKEN IN EMERGENCY - Motor Vehicles

When a person is involved in an emergency situation not of [***his/her***] own making and not created by [***his/her***] own negligence, that person is entitled to act as a reasonably prudent person would under similar circumstances.

Therefore, if you find that [***defendant's name***] was operating [***his/her/its***] vehicle in a reasonably prudent manner and was faced with a sudden emergency situation, then I instruct you that [***defendant's name***] was not required to act as a reasonable person who had sufficient time and opportunity to consider what the best course of action would be, but instead that [***he/she/they***] [was/were] required only to react as a reasonable person would under the circumstances.

Source:
Dadds v. Pennsylvania R. Co., Del. Supr., 251 A.2d 559, 560-61 (1969); *Panaro v. Cullen*, Del. Supr., 185 A.2d 889, 891 (1962).

10. SPECIAL DOCTRINES OF TORT LAW

GOOD SAMARITAN

Under Delaware, if a person voluntarily renders first aid or rescue assistance to a another person who is unconscious, ill, injured, or in need of rescue assistance, or any person in obvious physical distress or discomfort -- without expecting compensation from the person being helped -- the helper isn't liable for damages for injuries alleged to have been sustained by the person helped or for damages for the death of that person alleged to have occurred by reason of the attempt to help, unless the helper caused injuries or death by acting willfully, wantonly, recklessly, or with gross negligence.

If you find that [***plaintiff's name***]'s injuries were caused by [***defendant's name***]'s conduct, but that [***defendant's name***] was voluntarily providing emergency treatment to [***plaintiff's name***] without expecting compensation, then you must find for [***defendant's name***]. But if you find that [***defendant's name***] acted with gross negligence, recklessness, wantonness, or willfulness, then you must find for [***plaintiff's name***].

{**Comment**: *See jury instr. nos. 4.8, 4.9, 4.10 for definitions of intentional, reckless, and willful and wanton conduct.*}

Source:

DEL. CODE ANN. tit. 16, § 6801(a) (1995); *see also* DEL. CODE ANN. tit. 16, § 6802 (1995)(exempting nurses from civil liability for rendering emergency care); DEL. CODE ANN. tit. 16, § 6803 (1995)(State Emergency Response Commission)(repealed, 2001).

10. SPECIAL DOCTRINES OF TORT LAW

NO DRAM SHOP LAWS

{**Comment**: *The Delaware Supreme Court has consistently refused to impose dram shop liability upon vendors of alcoholic beverages in cases where a patron or a third party is injured off premises. If a patron or third party is injured on the premises, liability may be imposed under the rules of "innkeeper" liability.*}

Source:

McCall v. Villa Pizza, Inc., Del. Supr., 636 A.2d 912, 913 (1994)(en banc); *Acker v. S.W. Cantinas, Inc.*, Del. Supr., 586 A.2d 1178 (1991); *Wright v. Moffitt*, Del. Supr., 437 A.2d 554 (1981); *Cf. Moss Rehab v. White*, Del. Supr., 692 A.2d 902, 907-08 (1997).

10. SPECIAL DOCTRINES OF TORT LAW

LIABILITY TO RESCUERS

When a person negligently creates a situation in which it is reasonably foreseeable that rescuers will attempt to save a victim in peril, that person is liable for any injuries caused to the rescuers.

In this case, it is alleged that [__***person A***__] was injured while trying to save [__***person B***__]. If you find that [***defendant's name***]'s negligence caused the situation that led to this rescue attempt, and that this rescue attempt was a reasonably foreseeable consequence of [***defendant's name***]'s negligence, you must find for [__***person A***__].

Source:
Schwartzman v. Delaware Coach Co., Del. Super., 264 A.2d 519, 520 (1970); *cf. Carpenter v. O'Day*, Del. Super., 562 A.2d 595, 601-02 (adopting fireman's rule), *aff'd*, Del. Supr., 553 A.2d 638 (1988). *See also* PROSSER & KEETON ON TORTS § 44 (5th ed. 1984); 4 ALR 3d 558.

10. SPECIAL DOCTRINES OF TORT LAW

LAST CLEAR CHANCE (Abrogated)

{**Comment**: *This doctrine has been abrogated by the statutory adoption of comparative negligence.*}

Source:
Laws v. Webb, Del. Supr., 658 A.2d 1000, 1004-08 (1995).

10. SPECIAL DOCTRINES OF TORT LAW

UNAVOIDABLE ACCIDENT

The mere fact that an accident occurred does not mean that someone was negligent. There may have been an unavoidable accident for which no party is responsible. Such an accident is one that could not have been avoided through the exercise of proper care. If none of the parties was guilty of negligence proximately causing the accident, then the accident was unavoidable and [***defendant's name***] cannot be held liable.

Source:
Lutzkovitz v. Murray, Del. Supr., 339 A.2d 64, 67 (1975); *Rich v. Dean*, Del. Supr., 261 A.2d 522, 524-25 (1969); *Panaro v. Cullen*, Del. Supr., 185 A.2d 889, 891 (1962); *Dietz v. Mead*, Del. Supr., 160 A.2d 372 (1960). *See also* RESTATEMENT (SECOND) OF TORTS § 283C (1965).

10. SPECIAL DOCTRINES OF TORT LAW

STATE TORT IMMUNITY

Under Delaware law, no damages may be recovered against the State or any State officer or employee if the claim arose because of the performance of an official duty that was conducted in good faith for the benefit of the public. This rule is known as sovereign immunity. There is an exception to this rule, however, if the public officer or employee acted with gross or wanton negligence. Gross or wanton negligence refers to conduct of such a nature or degree that it constitutes a gross deviation from what a reasonable, ordinary person would do in the same situation. For [***plaintiff's name***]'s claim to fall within this exception to sovereign immunity, [***plaintiff's name***] must prove that [***defendant's name***] acted with gross or wanton negligence.

{**Comment**: *See Jury Instr. Nos. 4.9. and 4.10 for definitions of reckless, willful and wanton conduct.*}

Source:

DEL. CODE ANN. tit. 10, § 4001(3) (1999)(state tort immunity); DEL. CODE ANN. tit. 10, § 4011-4013 (1999)(county and municipal tort immunity); *Doe v. Cates*, Del. Supr., 499 A.2d 1175 (1985); *Vick v. Haller*, Del. Super., 512 A.2d 249, 250-52, *aff'd*, Del. Supr., 514 A.2d 782 (1986), *and aff'd in part and rev'd in part on procedural grounds*, 522 A.2d 865 (1987); *Eustice v. Rupert*, Del. Supr., 460 A.2d 507, 509 (1983)(discussing wanton conduct). *See also Smith v. New Castle County Vocational-Technical Sch. Dist.*, D. Del., 574 F. Supp. 813 (1983).

10. SPECIAL DOCTRINES OF TORT LAW

COUNTY AND MUNICIPAL TORT IMMUNITY

Delaware law provides that no damages may be recovered against a governmental entity or any public officer or employee if the claim arose because of the performance of an official duty that was conducted in good faith for the benefit of the public. This is known as sovereign immunity. There is an exception to this rule, however, if the public officer or employee acted outside the scope of employment or with gross or wanton negligence. Gross or wanton negligence refers to conduct of such a nature or degree that it constitutes a gross deviation from what a reasonable, ordinary person would do in the same situation.

For [***plaintiff's name***]'s claim to fall within this exception to sovereign immunity, [***plaintiff's name***] must prove that [***defendant's name***] acted outside the scope of [***his/her***] employment or acted with gross or wanton negligence.

{**Comment**: *See Jury Instr. Nos. 4.9 and 4.10 for definitions of reckless and willful and wanton conduct and Jury Instr. No. 18.5 for definition of scope of employment. Refer to § 4011 for a list of specific exceptions to the general rule of sovereign immunity.*}

Source:

DEL. CODE ANN. tit. 10, § 4011-4013 (1999)(county and municipal tort immunity); DEL. CODE ANN. tit. 11, § 231(d) (2001)(definition of criminal negligence); *Dale v. Town of Elsmere*, Del. Supr., 702 A.2d 1219, 1222 (1997); *Heaney v. New Castle County*, Del. Supr., 672 A.2d 11, 14 (1995); *Moore v. Wilmington Housing Authority*, Del. Supr., 619 A.2d 1166, 1167-69 (1993); *Sussex County v. Morris*, Del. Supr., 610 A.2d 1354, 1357-58 (1992); *Jardel Co. v. Hughes*, Del. Supr., 523 A.2d 518, 530 (1987)(concluding gross negligence falls within meaning of criminal negligence); *Vick v. Haller*, Del. Super., 512 A.2d 249, 250-52, *aff'd*, Del. Supr., 514 A.2d 782 (1986), *aff'd in part and rev'd in part on procedural grounds*, 522 A.2d 865 (1987). *See also Smith v. New Castle County Vocational Sch. Dist.*, D. Del., 574 F. Supp. 813 (1983).

DUTY OF THE RAILROAD AT RAIL CROSSINGS

Where railroad tracks cross a public highway, the railroad has a duty to erect warning systems that will notify persons attempting to cross the tracks of an approaching train. If a train is actually in the crossing, blocking the highway, it is ordinarily not necessary for the railroad to give any additional warning unless the crossing is extraordinarily dangerous.

If the crossing is extraordinarily dangerous, factors to consider in determining whether the warning system is adequate under the circumstances include:

1) the general terrain;

2) the grade of the highway and the crossing and its effect on the angle of headlights;

3) the volume of motor traffic on the highway and the frequency of trains on the rail line;

4) the angle at which the tracks intersect the highway;

5) physical obstructions to the motorist's view of the crossing; and

6) the presence or absence of lights on the train.

If you find that the warning system used by [***name of the railroad***] at this particular crossing was adequate to give timely warning to [***name of person***] when [***he/she***] attempted to cross, then your verdict must be for [***name of the railroad***].

Source:
DEL. CODE ANN. tit. 2, §§ 1803-1818 (2001); DEL. CODE ANN. tit. 17, §§ 701 *et. seq.* (1995); *Pennsylvania R. Co. v. Goldenbaum*, Del. Supr., 269 A.2d 229, 231-32 (1970).

DUTY OF COMMON CARRIERS

TO EXERCISE DUE CARE IN OPERATING THEIR VEHICLES

Common carriers must operate their vehicles with reasonable care. A common carrier is an individual or organization that transports passengers or goods and is required by law to transport them if the appropriate fare is paid. Common carriers may start and stop their vehicles only after passengers are fully inside the vehicle even if they are not seated. There may be minor jolts or jars in the starting or stopping. The operator of a common carrier must also exercise reasonable care in picking up and dropping off passengers at a safe place along the carrier's route.

If you find that [***name of common carrier***] did not exercise due care in operating its vehicle when [__describe incidents__] occurred, then you must find [***name of common carrier***] negligent.

Source:

DEL. CODE ANN. tit. 2, § 1801-1821 (2001); *Reeves v. American Airlines, Inc.*, Del. Supr., 408 A.2d 283 (1979)(aircraft); *Delaware Coach Co. v. Reynolds*, Del. Supr., 71 A.2d 69 (1950)(buses, application of res ipsa loquitur); *Lightburn v. Delaware Power & Light Co.*, Del. Super., 167 A.2d 64 (1960)(buses); *Winter v. Pennsylvania R. Co.*, Del. Super., 57 A.2d 750 (1948)(trains); *Cannon v. Delaware Elec. Power Co.*, Del. Super., 24 A.2d 325 (1942); *Cooke v. Elk Coach Line*, Del. Super., 180 A. 782 (1935)(buses). *See also* BLACK'S LAW DICTIONARY 83 (pocket ed. 1996).

10. SPECIAL DOCTRINES OF TORT LAW

DUTY OF PASSENGER TO FOLLOW REGULATIONS OF CARRIER AND THE INSTRUCTIONS OF THE PILOT/DRIVER

A passenger must take reasonable care to observe the regulations of a common carrier and must follow the reasonable instructions of the [__driver/pilot__]. If you find that [***name of passenger***] failed to take reasonable care to observe [***name of carrier***]'s reasonable regulations or follow the instructions of [***name of carrier's driver/pilot***], then you must return a verdict for the [***name of carrier***].

Source:

See Reeves v. American Airlines, Inc., Del. Supr., 408 A.2d 283, 284 (1979).

10. SPECIAL DOCTRINES OF TORT LAW

ULTRAHAZARDOUS ACTIVITIES

When a person engages in an activity that is inherently and extraordinarily dangerous, what the law calls an ultrahazardous activity, that person is liable for any injury proximately caused by the activity whether or not the person acted negligently. In this case, I have ruled that the [__describe the ultrahazardous activity__] undertaken by [***defendant's name***] is an ultrahazardous activity. Your duty is to determine whether it proximately caused the alleged injury to [***plaintiff's name***]. If you find that it did cause the injury, then you must determine the extent of the damages suffered.

Source:

Catholic Welfare Guild, Inc. v. Brodney Corp., Del. Super., 208 A.2d 301 (1964)(strict liability for damages from blasting in urban area); *but see Hammond v. Colt Industries Operating Corp.*, Del Super., 565 A.2d 558 (1989)(inherently dangerous product will not support claim based on strict liability for the sale of that product); *Fritz v. E.I. duPont de Nemours & Co.*, Del. Super., 75 A.2d 256 (1950)(declining to apply doctrine of strict liability to case involving the escape of chlorine gas from a manufacturing plant in a rural area).

10. SPECIAL DOCTRINES OF TORT LAW

DOMESTIC ANIMAL WITH VICIOUS PROPENSITIES

In this case, [***plaintiff's name***] has alleged that [***he/she***] was injured when [***defendant's name***]'s [__type of domestic animal__] [__bit, scratched, etc.__] [***him/her***].

When a person keeps a domestic animal, and that person knows or should know that the animal has a dangerous trait that other animals of the same breed don't have and fails to keep the animal secure, that person is liable for any physical harm done by the animal if the harm results from the dangerous trait.

Source:

Richmond v. Knowles, Del. Super., 265 A.2d 53, 55 (1970); *F. Giovannozzi & Sons v. Luciani*, Del. Super., 18 A.2d 435 (1941); *Duffy v. Gebhart*, Del. Super., 157 A.2d 585, 586 (1960). DEL. CODE ANN. tit. 7, § 1705 (2001)(dogs); PROSSER & KEETON ON TORTS § 76 (5th ed. 1984).

10. SPECIAL DOCTRINES OF TORT LAW

DOG BITE

The owner of an animal that isn't normally vicious is not liable for injury caused by the animal on the owner's property, unless the owner knew that the animal was vicious or dangerous to others.

It is enough to establish the owner's knowledge of the animal's dangerous traits if the owner knows, or reasonably should know, that the animal is inclined to injure people. To find a vicious or dangerous trait, it is not necessary to find that the animal had previously attacked or bitten another person.

{**Comment**: *This instruction is tailored for use with the Delaware Guest Statute.*}

Source:

DEL. CODE ANN. tit. 7, § 1705 (2001); *Weinbrum v. Montag*, Del. Super., C.A. No. 93C-03-089, Bifferato, R.J. (Nov. 6, 1995); *Richmond v. Knowles*, Del. Super., 265 A.2d 53, 55 (1970); *F. Giovannozzi & Sons v. Luciani*, Del. Super., 18 A.2d 435 (1941); *Duffy v. Gebhart*, Del. Super., 157 A.2d 585, 586 (1960). *See also* PROSSER & KEETON ON TORTS § 76 (5th ed. 1984).

10. SPECIAL DOCTRINES OF TORT LAW

DOG RUNNING FREE

Delaware law states that no dog is allowed to run free unless the dog is accompanied by the owner or a custodian and is under reasonable control, or unless the dog remains on the owner's property. Violation of this law constitutes negligence as a matter of law.

Source:

DEL. CODE ANN. tit. 7, § 1705 (2001); *Duffy v. Gebhart*, Del. Super., 157 A.2d 585, 586 (1960).

DUTY TO MAINTAIN PROPER LOOKOUT -- PEDESTRIANS

People have a duty to keep a proper lookout for their own safety. The duty to look implies the duty to see what is in plain view unless some reasonable explanation is offered. It is negligent not to see what is plainly visible where there is nothing to obscure one's vision, because a person is not only required to look, but also to use the sense of sight in a careful and intelligent manner to see things that a person in the ordinary exercise of care and caution would see under the circumstances.

If you find that [***party's name***] failed to maintain a proper lookout, you must find [***him/her***] negligent.

{**Comment**: *This instruction contemplates incidents arising in a non-commercial setting. See Jury Instr. No. 15.3 -- Business Invitee's Duty to Maintain Proper Lookout.*}

Source:

Trievel v. Sabo, Del. Supr.; 714 A.2d 742, 745 (1998); *See Moffitt v. Carroll*, Del. Supr., 640 A.2d 169, 172-76 (1994); *Howard v. Food Fair Stores, New Castle County, Inc.*, Del. Supr., 201 A.2d 638, 642 (1964); *cf. Franklin v. Salminen*, Del. Supr., 222 A.2d 261, 262 (1966)(holding proprietor not liable to invitee after giving proper warning to invitee of a plainly visible hazard which invitee then chose to disregard).

DEFAMATION

Defamation is a communication that tends to injure a person's "reputation" in the ordinary sense of that word; that is, some statement or action that diminishes the esteem, respect, goodwill, or confidence in which the person is held and tends to cause bad feelings or opinions about the person. Defamation necessarily involves the idea of disgrace. In this sense, a communication is defamatory if it tends to lower the person in the estimation of the community or if it deters third parties from associating or dealing with the person defamed.

But defamation occurs only when the defamatory information is communicated to someone other than the person to whom it refers. In the law, this is known as "publication."

Source:

See Helman v. State, Del. Supr., 784 A.2d 1058, 1070-71 (2001)(holding that designation as a sex offender is not defamatory); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029, 1035 (1998); *Kanaga v. Gannett Co.*, Del. Supr., 687 A.2d 173 (1996); *Gannett Co. v. Re*, Del. Supr., 496 A.2d 553 (1985); *Slawik v. News Journal Co.*, Del. Supr., 428 A.2d 15 (1981); *Spence v. Funk*, 396 A.2d 967, 969 (1978)(quoting PROSSER, HANDBOOK ON THE LAW OF TORTS § 112 (4th ed. 1974)); *Reardon v. News Journal Co.*, Del. Supr., 164 A.2d 263 (1960)(holding defamation is actionable if it imputes something which intends to disgrace, lower, or exclude one from, society, or bring one into contempt or ridicule); *Klein v. Sunbeam Corp.*, Del. Supr., 94 A.2d 385 (1952); *Saunders v. Board of Directors, WHYY-TV*, Del. Super., 382 A.2d 257, 258-59 (1978); *Tatro v. Esham*, Del. Super., 335 A.2d 623 (1975); *Danias v. Fakis*, Del. Super., 261 A.2d 529 (1969). *See also* RESTATEMENT (SECOND) OF TORTS § 559 (1965).

11. INTENTIONAL TORTS - Defamatory/Privacy Torts

LIBEL AND SLANDER

In general, libel is written defamation. Slander is oral defamation.

Source:

Schuster v. Derocili, Del. Supr., 775 A.2d 1029, 1040 (2001); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029 (1998); *Kanaga v. Gannett Co.*, Del. Supr., 687 A.2d 173 (1996); *Spence v. Funk*, Del. Supr., 396 A.2d 967, 969 (1978). *See also* PROSSER, HANDBOOK OF THE LAW OF TORTS § 112 (4th ed. 1974).

SLANDER AS A MATTER OF LAW

If a statement defames [***plaintiff's name***] in [***his/her/its***] trade, business, or profession, [***he/she/it***] need not show that the defamation caused actual monetary loss in order to recover damages.

{**Comment**: *Slander as a matter of law also includes defamatory statements that impugn a crime or a loathsome disease to the plaintiff or that impugn unchastity to a female plaintiff. If the alleged facts warrant, the instruction should be adapted accordingly.*}

Source:

Spence v. Funk, Del. Supr., 396 A.2d 967, 970 (1978); *Pierce v. Burns*, Del. Supr., 185 A.2d 477, 479 (1962); *Klein v. Sunbeam Corp.*, Del. Supr., 94 A.2d 385, 390-91 (1953); *Re v. Gannett Co.*, Del. Super., 480 A.2d 662 (1984); *Danias v. Fakis*, Del. Super., 261 A.2d 529, 531 (1969); *Stidham v. Wachtel*, Del. Super., 21 A.2d 282, 282-83 (1941); *Rice v. Simmons*, Del. Ct. of Err. & Apps., 2 Harr. 417 (1838).

LIBEL - NO ACTUAL LOSS MUST BE SHOWN

A claim for libel may be asserted without proof of any actual monetary loss. This is so whether the libel is clear from the statement itself or is clear only after referring to extrinsic facts not contained in the writing. In either case, a plaintiff is entitled to recover damages proximately caused by the defamation.

Source:

Gannett Co., Inc. v. Kanaga, Del. Supr., 750 A.2d 1174 (2000); *Kanaga v. Gannett Co.*, Del. Supr., 687 A.2d 173, 182-83 (1996); *Gannett Co. v. Re*, Del. Supr., 496 A.2d 553, 557 (1985); *Spence v. Funk*, Del. Supr., 396 A.2d 967, 971 (1978); *Klein v. Sunbeam Corp.*, Del. Supr., 94 A.2d 385, 390 (1952).

ELEMENTS OF DEFAMATION -- NON-PUBLIC FIGURES

[***Plaintiff's name***] has the burden of proving by a preponderance of the evidence all facts necessary to establish both of the following elements of [***his/her/its***] claim:

(1) that [***defendant's name***] defamed [***him/her***]; and

(2) that the defamation has been published.

Source:
Kanaga v. Gannett Co., Del. Supr., 687 A.2d 173 (1996); *Short v. News Journal Co.*, Del. Supr., 212 A.2d 718 (1965).

ELEMENTS OF DEFAMATION

-- NON-PUBLIC FIGURE VS. MEDIA DEFENDANT --

[***Plaintiff's name***] has the burden of proving by a preponderance of the evidence all facts necessary to establish each of the following elements of [***his/her/its***] claim:

(1) that [***defendant's name***] defamed [***him/her/it***];

(2) that [***defendant's name***] published the defamatory matter;

(3) that [***defendant's name***] was negligent in failing to determine the truth of the matter; and

(4) that the defamation caused injury to [***plaintiff's name***].

Source:

See Gannett Co., Inc. v. Kanaga, Del. Supr., 750 A.2d 1174, 1193 n.16 (2000)(Chandler, Chancellor, dissenting); *Kanaga v. Gannett Co., Inc.*, Del. Supr., 687 A.2d 173 (1996); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029 (1998); *Gannett Co. Inc. v. Re*, Del. Supr., 496 A.2d 553 (1985). *See also Rosenbloom v. Metromedia*, U.S. Supr., 403 U.S. 29, 30, 91 S. Ct. 1811, 1813, 29 L.Ed.2d 296 (1971); *N.Y. Times Co. v. Sullivan*, U.S. Supr., 376 U.S. 254, 285, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964).

ELEMENTS OF DEFAMATION -- PUBLIC-FIGURE PLAINTIFF

[***Plaintiff's name***] has the burden of proving by a preponderance of the evidence facts necessary to establish each of the following elements of [***his/her/its***] claim:

(1) that [***defendant's name***] defamed [***him/her/it***];

(2) that [***defendant's name***] published the defamatory matter;

(3) that [***defendant's name***] intentionally or recklessly failed to determine the truth of the defamatory matter; and

(4) that the publication of the defamatory matter caused injury to [***plaintiff's name***].

Source:

Gertz v. Welch, Inc., U.S. Supr., 418 U.S. 323, 94 S. Ct. 2997 (1974); *See Jackson v. Filliben*, Del. Supr., 281 A.2d 604, 605 (1971); *New York Times Co. v. Sullivan*, U.S. Supr., 84 S. Ct. 710 (1964).

INTENTIONAL PUBLICATION

A person intentionally publishes a defamatory communication when that person knows that it is false.

Source:

See PROSSER & KEETON ON TORTS §§ 111-113 (5th ed. 1984).

NEGLIGENT PUBLICATION

A person negligently publishes a defamatory communication when a reasonable person under the circumstances would not have published the communication.

Source:
Kanaga v. Gannett Co., Inc., Del. Supr., 687 A.2d 173 (1996); *Gannett Co., Inc. v. Kanaga*, Del. Supr., 750 A.2d 1174 (2000); *Re v. Gannett Co.*, Del. Super., 480 A.2d 662, 666 (1984), *aff'd*, Del. Supr., 496 A.2d 553, 557 (1985); *Gannett v. Re*, Del. Supr., 496 A.2d 553.557 (1985).

RECKLESS PUBLICATION

A person recklessly publishes a defamatory communication when [***he/she/it***] knows that it is false or acts with utter disregard for whether it is false.

Source:

See PROSSER & KEETON ON TORTS §§ 111-113 (5th ed. 1984); *Kanaga v. Gannett Co., Inc.*, Del. Supr., 687 A.2d 173, 183 (1996).

INJURY TO REPUTATION

In determining how much [***plaintiff's name***]'s reputation has been harmed, you must consider the reputation that [***plaintiff's name***] enjoyed before the defamatory publication as compared to the reputation that [***he/she/it***] enjoyed after the publication, and whether that reputation has actually been diminished since the publication. You may also consider the manner in which the defamatory matter was distributed and the extent of its circulation in [***plaintiff's name***]'s community and whether those who [__read the article / heard the broadcast, etc.__] understood it to refer to [***plaintiff's name***].

Source:

Gannett Co., Inc. v. Kanaga, Del. Supr., 750 A.2d 1174, 1183-90 (2000); *See* PROSSER & KEETON ON TORTS §§ 111-113 (5th ed. 1984); *Kanaga v. Gannett Co., Inc.*, Del. Supr., 687 A.2d 173, 183 (1996).

TRUTH OR SUBSTANTIAL TRUTH AS A DEFENSE

It is an absolute defense to a claim of defamation that the alleged defamatory statements were substantially true at the time the statements were made. Thus, even if you find that [***defendant's name***] made defamatory statements about [***plaintiff's name***] that proximately caused [***him/her/it***] injury, you cannot award damages if you find that the statements were substantially true.

The alleged defamatory statements don't have to be absolutely true for [***defendant's name***] to successfully assert this defense. Substantially true statements are not defamatory. To determine if a statement is substantially true, you must determine if the alleged defamation was no more damaging to [***plaintiff's name***]'s reputation than an absolutely true statement would have been. In other words, if the "gist" or "sting" of the allegedly defamatory statement produces the same effect in the mind of the recipient as the precise truth would have produced, then the statement is "substantially true" and you cannot award damages to [***plaintiff's name***] for the statement.

To prevail on this defense, [***defendant's name***] bears the burden of proving by a preponderance of the evidence that the alleged defamatory statements were true or substantially true.

Source:

Gannett Co., Inc. v. Kanaga, Del. Supr., 750 A.2d 1174, 1191–97 (2000)(Chandler, Chancellor, dissenting); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029, 1035-36 (1998); *Riley v. Moyed*, Del. Supr., 529 A.2d 248, 253 (1987); *Gannett Co. v. Re*, Del. Supr., 496 A.2d 553, 557 (1985); *Ramada Inns, Inc. v. Dow Jones & Co.*, Del. Super., 543 A.2d 313, 317-18 (1987).

FALSITY -- MEDIA DEFENDANT

[***Plaintiff's name***] has the burden of proving that the defamatory statement was false. If you find that the publication was true, you must find for [***defendant's name***]. The publication doesn't have to be absolutely or mathematically true. Substantial truth is all that is required.

Source:

Gannett Co., Inc. v. Kanaga, Del. Supr., 750 A.2d 1174, 1191–97 (2000)(Chandler, Chancellor, dissenting); *Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029, 1035-36 (1998); *Ramada Inns, Inc. v. Dow Jones & Co.*, 543 A.2d 313, 318-19 (1987). *See also Philadelphia Newspapers, Inc., v. Hepps*, U.S. Supr., 475 U.S. 767, 106 S. Ct. 1558, 1562-65 (1986).

PRESUMPTION OF GOOD REPUTATION

In the absence of contrary evidence, the law presumes that the plaintiff, at the time any defamatory statements were made, enjoyed a good name and reputation.

Source:

Gannett Co., Inc. v. Kanaga, Del. Supr., 750 A.2d 1174, 1184 n.3 (2000); *See* PROSSER & KEETON ON TORTS §§ 111-113 (5th ed. 1984).

RETRACTION

Retraction is the act of withdrawing the defamatory statement; it may be considered as a factor in reducing damages and negating malice. To be effective, a retraction must be:

(1) full, complete, and sincere;

(2) as conspicuous as the original defamation and with sufficient resources dedicated to provide some measure of confidence that the retraction will reach as many persons as the original defamatory statement; and

(3) issued within a reasonable time of when the original defamatory and false statement was published.

Source:

Ross v. News Journal Co., Del. Super., 228 A.2d 531 (1967)(retraction may negate any inference of malice, reckless disregard of truth or falsity). *See also Brogan v. Passaic Daily News*, N.J. Supr., 123 A.2d 473 (1956).

"ACTUAL MALICE" DEFINED

A publication is made with "actual malice" if it is made with knowledge that it is false or with reckless disregard for whether it is false.

Source:
New York Times Co. v. Sullivan, U.S. Supr., 84 S. Ct. 710 (1964); *Kanaga v. Gannett Co., Inc.*, Del. Supr., 687 A.2d 173, 183 (1996).

DEFAMATION -- DEFENSE OF A CONDITIONAL PRIVILEGE

I have determined, as a matter of law, that [***defendant's name***] was privileged to publish false and defamatory communications. But a person with this privilege may not abuse it. You must determine whether [***defendant's name***] abused [***his/her/its***] privilege. If you find that [***he/she/it***] did, you may return a verdict in favor of [***plaintiff's name***] and against [***defendant's name***].

The privilege that applies to [***defendant's name***] is [__state privilege__]. This privilege is abused, however, if [***defendant's name***] made or published the false and defamatory communication intentionally, that is, with knowledge of its falsity; or recklessly, that is, disregarding whether it was true or false. The privilege is also abused when asserted outside [***defendant's name***]'s performance of [***his/her/its***] duties or functions that give rise to the privilege.

{**Comment**: *Examples of such conditional privileges include: Communications among persons with a common interest in a particular subject, such as work-related matters; intercommunications among immediate family members; good-faith communications intended to prevent a crime or to apprehend a criminal.*}

Source:

Burr v. Atlantic Aviation, Del. Supr., 348 A.2d 179 (1975); *Klein v. Sunbeam Corp.*, Del. Supr., 94 A.2d 385 (1953); *Battista v. Chrysler Corp.*, Del. Super., 454 A.2d 286 (1982). *See also* RESTATEMENT OF TORTS § 593-598A (1965).

INVASION OF PRIVACY

{*There are four general claims for invasion of privacy. Choose the one appropriate to the circumstances of the case*}:

Intrusion: One who intentionally intrudes, physically or otherwise, into another person's solitude, seclusion, or private affairs, is responsible to that person for any harm suffered as a result of this invasion of privacy if that type of intrusion would be highly offensive to a reasonable person. The question is whether a reasonable person in similar circumstances would find the conduct very objectionable or would be expected to take serious offense to it.

Appropriation: One who appropriates the name or likeness of another person for use or benefit is responsible to that person for any harm suffered as a result of this invasion of privacy.

Publication of Private Facts: One who negligently publicizes a matter concerning another person's private life is responsible to that person for any harm caused by this invasion of privacy if similar publicity about a reasonable person would be highly offensive to that person and if the matter is not one of legitimate concern to the public.

The question is whether a reasonable person in similar circumstances would find the conduct very objectionable or would expect take serious offense to it. Publication or publicity means that the matter is communicated to the public at large or to so many persons that the matter must be regarded as substantially certain to become public knowledge.

False Light: One who publicizes a matter concerning another person and places that person before the public in a false light is responsible to that person for any harm suffered as a result of this publicity if similar publicity about a reasonable person would be highly offensive to that reasonable person and if the person giving the publicity knew the matter was false or recklessly disregarded whether it was false.

The question is whether a reasonable person in similar circumstances would find the conduct very objectionable or would be expected to take serious offense to it. Publication or publicity means that the matter is communicated to the public at large or to so many persons that the matter must be regarded as substantially certain to become public knowledge.

{**Comment**: *Liability for negative publicity cast in a false light may exist under this instruction if the defendant is found to have acted negligently, but this area of the law is one of evolving constitutional interpretation by the United States Supreme Court. It is possible that the* New York Times *"actual malice" standard may be the only basis for imposing liability.* Compare Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534 (1967)* with Gertz. v. Robert Welch, Inc.*, 418 U.S. 323, 334, n.6, 94 S. Ct. 2997, 3004 n.6 (1974).*}

Source:

Barker v. Huang, Del. Supr., 610 A.2d 1341, 1349-50 (1992); *Barbieri v. News Journal Co.*, Del. Supr., 189 A.2d 773, 774-74 (1963) (outlining the basic elements for a claim of invasion of privacy); *Reardon v. News Journal Co.*, Del. Supr., 164 A.2d 263, 266 (1960).

MALICIOUS PROSECUTION

A person who causes a civil or criminal proceeding to be initiated or continued against another, resulting in [***his/her***] arrest, seizure of [***his/her***] property, or other special injury, is responsible for the injury if the proceeding was initiated or continued with malice and without probable cause and was terminated in favor of the plaintiff.

For the plaintiff to prevail, five elements must be shown:

(1) [***defendant's name***] instituted civil or criminal proceedings against [***plaintiff's name***];

(2) no probable cause existed to support the charge or claim;

(3) the proceedings were instituted and pursued with malice;

(4) the proceedings were terminated in [***plaintiff's name***]'s favor; and

(5) [***plaintiff's name***] suffered damages as a result.

Source:

Delaware case law covers Civil as well as Criminal prosecution. *Kaye v. Pantone, Inc.*, Del. Ch., 395 A.2d 369, 372-73 (1978); *Alexander v. Petty*, Del. Ch., 108 A.2d 575, 577 (1954)(recovery of damages only after successful defense of action against defendant); *Nix v. Sawyer*, Del. Super., 466 A.2d 407, 411-12 (1983); *Brown v. Cluley*, Del. Super., 179 A.2d 93, 98 (1962)(probable cause); *Stidham v. Diamond State Brewery*, Del. Super., 21 A.2d 283, 284-85 (1941)(probable cause, malice); *Melson v. Tindal*, Del. Com. Pl., 1 Del. Cas. 79 (1795)(defendant liable for maliciously swearing breach of peace against plaintiff and causing him to be bound to appear at Quarter Sessions).

FAVORABLE TERMINATION OF CHARGES AGAINST PLAINTIFF

[I have ruled as a matter of law / It has been stipulated] that [__describe charges__] brought against [***plaintiff's name***] by [***defendant's name***] were terminated in [***plaintiff's name***]'s favor. In your deliberations, you need consider only whether [***plaintiff's name***] has proved [__describe remaining elements in dispute__].

Source:

Kaye v. Pantone, Inc., Del. Ch., 395 A.2d 369, 372-73 (1978); *Alexander v. Petty*, Del. Ch., 108 A.2d 575, 577 (1954)(recovery of damages only after successful defense of action against defendant); *Stidham v. Diamond State Brewery*, Del. Super., 21 A.2d 283, 284-85 (1941)(probable cause, malice).

PROBABLE CAUSE - MATTER OF LAW

[I have ruled as a matter of law / It has been stipulated] that probable cause did not exist when the charges were brought against [***plaintiff's name***] by [***defendant's name***]. In your deliberations you need consider only whether [***plaintiff's name***] has proved [__describe remaining elements in dispute__].

PROBABLE CAUSE -- QUESTION OF FACT FOR THE JURY

You must determine whether probable cause existed to support [***defendant's name***]'s charge or claim against [***plaintiff's name***]. Probable cause means that there is a reasonable basis within the facts and circumstances when the charge or claim was made to believe that a crime or a tort had been committed.

Source:

Kaye v. Pantone, Inc., Del. Ch., 395 A.2d 369, 372-73 (1978); *Alexander v. Petty*, Del. Ch., 108 A.2d 575, 577 (1954)(recovery of damages only after successful defense of action against defendant); *Brown v. Cluley*, Del. Super., 179 A.2d 93, 98 (1962)(probable cause); *Stidham v. Diamond State Brewery*, Del. Super., 21 A.2d 283, 284-85 (1941)(probable cause, malice).

See also DEL. CODE ANN. tit. 11, § 1902 (2001) (defining detention for questioning which is not an arrest); DEL. CODE ANN. tit. 11, § 1911 (2001)(defining who is a police officer); *Jarvis v. State*, Del. Supr., 600 A.2d 38, 41 (1991)(reasonable suspicion not sufficient to justify arrest, probable cause required); *Coleman v. State*, Del. Supr., 562 A.2d 1171, 1175 (1989)(probable cause measured in the totality of circumstances), *cert. denied*, 493 U.S. 1027, 110 S. Ct. 736, 107 L.Ed.2d 754 (1990); *State v. Wrightson*, Del. Super., 391 A.2d 227, 229 (1978)(arrest requires probable cause that a crime has been or is about to be committed); *State v. Moore*, Del. Super., 187 A.2d 807, 813 (1963)(unlawful delay may render police liable for false arrest); *Petit v. Colmary*, Del. Super., 55 A. 344 (1903); *State v. Brewer*, Del. Gen. Sess., 114 A. 604 (1921). *See also* RESTATEMENT (SECOND) OF TORTS § 35, *et. seq.*; PROSSER & KEETON ON TORTS § 11.

MALICE DEFINED

In this case [***plaintiff's name***] must show that [***defendant's name***] acted with malice. To be malicious, the acts of [***defendant's name***] must have been done with a wrongful or improper motive or with a wanton disregard of [***plaintiff's name***] rights. Malice does not necessarily mean that there was actual spite, ill will, or a grudge, although they may have existed.

{**Comment**: *See Jury Instr. No. 4.10 for a definition of "wanton."*}

Source:
Kaye v. Pantone, Inc., Del. Ch., 395 A.2d 369, 372-73 (1978); *Nix v. Sawyer*, Del. Super., 466 A.2d 407, 411-12 (1983); *Stidham v. Diamond State Brewery*, Del. Super., 21 A.2d 283, 284-85 (1941)(probable cause, malice).

WHERE PROBABLE CAUSE IS BASED ON FRAUD OR FALSE TESTIMONY

Ordinarily, when someone is committed by a judicial officer to police custody or indicted by a grand jury, probable cause is established for the prosecution of a crime. The presumption that probable cause existed, however, is overcome if [***defendant's name***] withheld facts or other material evidence from [__the magistrate, grand jury, or [***his/her/its***] attorney__]. Evidence is material when it has a logical connection with the facts of the case.

If you find that [***defendant's name***] withheld facts or other material evidence from the [__the magistrate, grand jury, or [***his/her/its***] attorney__], you must then determine whether or not probable cause existed.

Source:

Kaye v. Pantone, Inc., Del. Ch., 395 A.2d 369, 372-73 (1978); *Alexander v. Petty*, Del. Ch., 108 A.2d 575, 577 (1954)(recovery of damages only after successful defense of action against defendant); *Brown v. Cluley*, Del. Super., 179 A.2d 93, 98 (1962)(probable cause); BLACK'S LAW DICTIONARY 236 (Garner, ed., pocket edition 1996).

ABUSE OF PROCESS

One who willfully uses the legal system, whether through a criminal or civil action in the courts or in a regulatory agency, against another primarily to accomplish a purpose for which the system is not designed is responsible to the person against whom the legal process was used for any harm caused by such use. I have determined as a matter of law that [***defendant's name***] caused legal process to issue against [***plaintiff's name***] in the nature of [__state process__]. The purpose for which [__state process__] is designed is to [__state purpose__].

The elements that [***plaintiff's name***] must prove are:

(1) an improper or wrongful purpose in using the legal process; and

(2) a willful act in the use of the system not proper in the regular conduct of legal proceedings.

Source:

Nix v. Sawyer, Del. Super., 466 A.2d 407, 412 (1983)(adopting PROSSER & KEETON ON TORTS § 121 (4th Ed. 1971)); *Unit, Inc. v. Kentucky Fried Chicken Corp.*, Del. Super., 304 A.2d 320, 331-32 (1973). *See also* RESTATEMENT (SECOND) OF TORTS § 136 cmt. d (1965).

INTENTIONAL INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP

{**Comment**: *Instruct as appropriate*}:

- One who intentionally and improperly induces or otherwise intentionally causes a third party not to perform a contract with another party is responsible to that other party for the loss suffered as a result of the breach of contract.
- One who intentionally and improperly induces or otherwise intentionally prevents another from performing a contract with a third party or makes the performance of the contract more costly is responsible to the other party for the loss suffered as a result of the prevention or interference with the contract.
- One who purposely and improperly induces or otherwise purposely causes a third party not to enter into or continue a prospective contractual relation with another is responsible to that other party for the loss suffered as a result of the prevention or interference with the contractual relationship.

You must determine whether or not [***defendant's name***]'s conduct was improper. In doing so, you may consider the following factors:

(1) the nature of [***defendant's name***]'s conduct;

(2) [***defendant's name***]'s motive;

(3) [***plaintiff's name***]'s interests;

(4) the expectations of the parties involved;

(5) the relations between the parties involved;

(6) the interest that [***defendant's name***] sought to advance;

(7) whether [***defendant's name***]'s act was done for the purpose of causing the interference or whether it was merely incidental to another purpose;

(8) the proximity or remoteness of [***defendant's name***]'s conduct to the interference; and

(9) society's interest in protecting business competition as well as its interest in protecting the individual against interference with the pursuit of gain.

Source:

Irwin & Leighton, Inc., v. W.M. Anderson Co., Del. Ch., 532 A.2d 983, 992-93 (1987); *Bowl-Mor Company Inc. v. Brunswick Corp.*, Del. Ch., 297 A.2d 61, 64 (1972); *De Bonaventura v. Nationwide Mut. Ins.*, Del. Ch., 419 A.2d 942, 947 (1980), *aff'd*, Del. Supr., 428 A.2d 1151, 1153 (1981).

Connolly v. Labowitz, Del. Super., 519 A.2d 138, 143 (1986); *Stoltz v. Delaware Real Estate Comm'n*, Del. Super., 473 A.2d 1258, 1263-64 (1984); *Andres v. Williams*, Del. Supr., 405 A.2d 121, 122-23 (1979); *Murphy v. Godwin*, Del. Super., 303 A.2d 668 (1973); *Metropolitan Convoy Corp. v. Chrysler Corp.*, Del. Super., 173 A.2d 617, 626 (1961); *Regal Home Distributors v. Gordon*, Del. Super., 66 A.2d 754, 754-55 (1949).

See also RESTATEMENT (SECOND) TORTS §§ 766, 767 (1965).

13. INTENTIONAL TORTS - Torts Against the Body

ASSAULT

If you find that [***defendant's name***] intentionally, and without [***plaintiff's name***]'s consent, caused [***plaintiff's name***] to be in fear of an immediate harmful or offensive contact, then [***defendant's name***] is liable for assault. It is not necessary for any actual contact to have been made between the parties.

Source:

See RESTATEMENT (SECOND) OF TORTS § 21 *et seq.*; PROSSER & KEETON ON TORTS § 10 (5th ed. 1984).

13. INTENTIONAL TORTS - Torts Against the Body

BATTERY

If you find that [***defendant's name***] intentionally, and without [***plaintiff's name***]'s consent, made contact with [***plaintiff's name***] in a harmful or offensive way, then [***defendant's name***] is liable for battery.

{**Comment**: *If the plaintiff was not harmed by the contact, but is claiming that he or she was offended by it, an "offensiveness" instruction will be necessary; see Jury Instr. No. 13.7.*}

Source:
Brzoska v. Olson, Del. Supr., 668 A.2d 1355, 1360-61 (1995) (en banc); RESTATEMENT (SECOND) OF TORTS § 13 *et seq.* (1965).

CONSENT

[***Defendant's name***] has alleged that [***plaintiff's name***] permitted [***defendant's name***] to make contact with [***plaintiff's name***]'s person. If you find that [***plaintiff's name***] showed a willingness to engage in the alleged conduct and that [***defendant's name***] acted in response to this willingness, then you must find for [***defendant's name***].

{**Comment**: *See also Jury Instr. 9.4, "Assumption of the Risk," especially as it pertains to participants in sporting events.*}

Source:
DEL. CODE ANN. tit. 18, § 6801(6) (1999)(medical informed consent); *Brzoska v. Olson*, Del. Supr., 668 A.2d 1355, 1360-61 (1995)(medical informed consent and AIDS); *Newmark v. Williams*, Del. Supr., 588 A.2d 1108, 1115 (1991)(medical informed consent for minors). *See also* PROSSER & KEETON ON TORTS § 18 (5th ed. 1984).

USE OF FORCE IN LAWFUL ARREST

A citizen has a duty to cooperate with the directions of a peace officer attempting to make a lawful arrest. If resisted, the officer may use such force as is reasonably necessary to make the arrest. If you find that [***name of officer***] used excessive and unnecessary force to make the arrest of [***plaintiff's name***], then you must return a verdict for [***plaintiff's name***]. If you find that [***name of officer***] used reasonable and necessary force to make the arrest of [***plaintiff's name***], then you must return a verdict for [***name of officer***].

Source:

DEL. CODE ANN. tit. 11, § 467 (2001) *See In re Request for Advisory Opinion*, Del. Supr. 722 A.2d 307, 311 (1998); *State v. Krakus*, Del. Oyer & Term., 93 A. 554, 555 (1915); *Petit v. Colmery*, Del. Super., 55 A. 344, 345 (1903).

SELF-DEFENSE IN ASSAULT AND BATTERY CASES

In this case, [***defendant's name***] alleges that [***he/she***] acted in self-defense. Self-defense is an affirmative defense to [***plaintiff's name***]'s claim. So the burden of proving self-defense is on [***defendant's name***]. [***Defendant's name***] contends that [***he/she***] acted in self-defense after [***he/she***] was attacked by [***plaintiff's name***]. When attacked, one may use the force that is sufficient to repel the attack, but the resistance must be no more than is reasonably necessary to protect oneself from bodily harm. If the resistance or retaliation is excessive or out of proportion to the danger, it is not justified.

A person using force to protect [***himself/herself***] from harm may estimate the necessity of using that force under the circumstances as [***he/she***] believes it to be at the time that the force is used. The person attacked is under no duty to retreat from [***his/her***] attacker, or to surrender possession of any property belonging to [***him/her***], or to perform any other act that [***he/she***] has no legal duty to do, or to abstain from any lawful action.

If you find that [***defendant's name***] was acting in self-defense when [***he/she***] struck [***plaintiff's name***], you must return a verdict in favor of [***defendant's name***].

Source:

DEL. CODE ANN. tit. 11, § 464(a) and (b) (2001); *Tice v. State*; Del. Supr., 624 A.2d 399, 401 (1993); Moor *v. Licciardello*, Del. Supr., 463 A.2d 268, 270-72 (1983) (subjective standard applied); *Tice v. State*, 382 A.2d 231, 233 nn. 3,4 (1974)(same); *Coleman v. State*, Del. Supr., 320 A.2d 740 (1974)(same); *State v. Stevenson*, Del. Oyer & Term., 188 A. 750, 751 (1936)(victim may use no more force than is necessary for the purpose of resisting assault); *State v. Roe*, Del. Gen. Sess., 103 A. 16, 16 (1918)(mere words or threats do not justify assault).

SELF-DEFENSE WITH DEADLY FORCE

[***Defendant's name***] contends is that [***he/she***] acted in self-defense after being attacked by [***plaintiff's name***]. You may find that [***defendant's name***] used deadly force. "Deadly force" is force used with the purpose of causing death or serious physical injury or with the knowledge of a substantial risk of causing death or serious physical injury.

Deadly force by [***defendant's name***] is justified if the defendant believed it was necessary to protect [***himself/herself***] against death, kidnapping, unlawful sexual intercourse, or serious physical injury. "Serious physical injury" means physical injury that creates a substantial risk of death, or that causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

The use of deadly force is not justified if the defendant, with the purpose of causing death or serious physical injury, provoked the use of force in the same encounter. Nor is deadly force justified when the defendant knows that [***he/she***] can avoid the use of deadly force with complete safety by retreating, by surrendering possession of a thing to a person claiming a right to it, or by complying with a demand that [***he/she***] abstain from performing an act that [***he/she***] is not legally obligated to perform. But the defendant is under no obligation to retreat in or from [***his/her***] dwelling, or in or from [***his/her***] place of work.

If you find that [***defendant's name***] was not acting in self-defense, or that [***his/her***] use of deadly force was not justified, you must find in favor of [***plaintiff's name***]. But if you find that [***defendant's name***] was acting in self-defense and was justified in using deadly force, you must find in favor of [***defendant's name***].

Source:

DEL. CODE ANN. tit. 11, §§ 222(21), 464(c)-(e), 471(d) (2001); *Moor v. Licciardello*, Del. Supr., 463 A.2d 268, 270-272 (1983)(incorporating the self-defense principles of the criminal code to civil cases and abrogating the common law rule of self-defense).

OFFENSIVENESS

[***Plaintiff's name***] has alleged that [***defendant's name***]'s contact with [***him/her***] was offensive. For contact to be offensive, it must offend a reasonable sense of personal dignity; that is, it must be contact that would offend the ordinary person and not one who is unduly sensitive about [***his/her***] personal dignity.

Source:

Brzoska v. Olson, Del. Supr., 668 A.2d 1355, 1361 (1995)(en banc).

13. INTENTIONAL TORTS - Torts Against the Body

FALSE IMPRISONMENT

A person who intentionally causes the improper confinement of another person against [***his/her***] will is responsible to that person for all harm caused by the confinement. A confinement is improper when the person detained has not consented to it and the person causing the confinement was not privileged to do so.

Confinement means a restriction within the boundaries fixed by another from which the restricted person knows of no reasonable means of escape. A reasonable means of escape is an escape by which a person would run no risk of harm to self or property. A confinement may be accomplished by actual or apparent physical barriers, actual physical force, threats of physical force, or any other form of duress or coercion.

The requirement of imprisonment means that the restraint must be a total one and not merely preventing someone from going where he or she pleases.

{**Comment**: *See also Jury Instr. 13.11, "Shoplifting."*}

Source:

See RESTATEMENT (SECOND) OF TORTS §§ 35-45 (general rule), 67-69 (privilege of self-defense), 147-155 (parental and *in loco parentis* privileges) (1965); PROSSER & KEETON ON TORTS § 11 at 47 (5th ed. 1986). *See also* DEL. CODE ANN. tit. 11, § 840 (2001)(shoplifting).

ARREST WITHOUT WARRANT

Delaware law provides that a peace officer may arrest a person without a warrant if the officer has witnessed, or has reasonable ground to believe that the person has committed, a crime in the officer's presence. If the officer has reasonable ground to believe that a felony has been committed, the officer may arrest a suspect whether or not the officer was present at the scene of the crime and whether or not a felony was actually committed. An officer may also make a warrantless arrest if a felony has been committed by the person even though the officer had no reasonable ground at the time of the arrest to believe the person committed the felony.

Reasonable ground for an arrest exists whenever all the facts and circumstances within the officer's knowledge are reasonably reliable and sufficient to allow a prudent person to conclude that the suspect has committed or is committing a crime. Mere suspicion of a criminal offense, without something more, does not justify an arrest.

Source:

DEL. CODE ANN. tit. 11, § 1904 (2001); *Darling v. State*; Del. Supr., 768 A.2d 463, 465-66 (2001); *Coleman v. State*, Del. Supr., 562 A.2d 1171, 1175-77 (1989)(probable cause measured in the totality of circumstances), *cert. denied*, 493 U.S. 1027, 110 S. Ct. 736, 107 L.Ed.2d 754 (1990); *Thompson v. State*, Del. Supr., 539 A.2d 1052, 1054-56 (1988). *See also Illinois v. Gates*, U.S. Supr., 462 U.S. 213, 230-32, 103 S. Ct. 2317, 76 L.Ed.2d 527, 543-44 (1983); PROSSER & KEETON ON TORTS § 11 at 50-52 (5th ed. 1986).

ARREST BY PRIVATE PERSON

A private person may make an arrest without a warrant for an offense that was committed in his or her presence and that amounted to or threatened a breach of the peace. A breach of the peace is a public offense involving violence or causing or likely to cause an immediate disturbance of public order.

{**Comment**: *This Rule does not apply to Motor Vehicle Violations.*}

Source:

State v. Cochran, Del. Supr., 372 A.2d 193, 195 n.2 (1977); *State v. Hodgson*, Del. Super., 200 A.2d 567 (1964)(common law citizen's arrest powers limited to breach or threatened breach of the peace); *cf.* DEL. CODE ANN. tit. 11, § 1912 (2001)(authorizing federal law enforcement officers to make arrests in their official capacity); DEL. CODE ANN. tit. 11, § 1932 (2001)(authorizing arrest by out-of-state police in "fresh pursuit"). *See also* PROSSER & KEETON ON TORTS § 11 (5th ed. 1986).

REASONABLE DETENTION BY PROPERTY OWNER - SHOPLIFTING

A property or business owner who reasonably believes that a person has wrongfully taken property from the premises or has failed to pay for goods or services may detain the person on the premises for the time necessary to make a reasonable investigation of the facts, to report the information to a peace officer, and to hold the person in a reasonable manner until the officer arrives.

Source:

DEL. CODE ANN. tit. 11, § 840 (2001)(Shoplifting Statute); RESTATEMENT (SECOND) OF TORTS § 120A (1965).

13. INTENTIONAL TORTS - Torts Against the Body

PROBABLE CAUSE FOR ARREST

Probable cause is an assessment of all the facts and circumstances that are reasonably reliable and sufficient and that would lead a prudent person to conclude that a suspect has committed or is committing a crime. Probable cause is a practical, nontechnical standard based on the everyday life experience that reasonable, prudent persons act on. It is a common sense standard that includes the experience of those versed in the field of law enforcement.

Source:

Darling v. State; Del. Supr., 768 A.2d 463, 465-66 (2001); *Illinois v. Gates*, U.S. Supr., 462 U.S. 213, 230-32, 103 S. Ct. 2317, 76 L.Ed.2d 527, 543-44 (1983); *Jarvis v. State*, Del. Supr., 600 A.2d 38, 41 (1991)(reasonable suspicion not sufficient to justify arrest, probable cause required); *Coleman v. State*, Del. Supr., 562 A.2d 1171, 1175 (1989)(probable cause measured in the totality of circumstances), *cert. denied*, 493 U.S. 1027, 110 S. Ct. 736, 107 L.Ed.2d 754 (1990); *State v. Moore*, Del. Super., 187 A.2d 807, 813 (1963)(unlawful delay may render police liable for false arrest).

OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS

If a person intentionally or recklessly causes severe emotional distress to another by extreme and outrageous conduct, that person is liable for the emotional distress and for any bodily harm that results from the distress.

Extreme and outrageous conduct goes beyond all possible bounds of decency and would be regarded as atrocious and utterly intolerable in a civilized community. Emotional distress includes all highly unpleasant mental reactions, including fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry. Severe emotional distress is so extreme that no reasonable person could be expected to endure it.

Liability for severe emotional distress, however, does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The law cannot intervene in every case where someone's feelings are hurt. There must still be freedom to express unflattering opinions. The law will intervene only where the distress is so severe that no reasonable person could be expected to endure it. In this regard, the intensity and the duration of the distress are factors to be considered in determining its severity.

If you find that [***defendant's name***]'s conduct was outrageous and extreme and that this conduct caused [***plaintiff's name***] to suffer severe emotional distress, then you must find [***defendant's name***] liable for damages.

Source:

Brett v. Berkowitz, Del. Supr., 706 A.2d 509, 513 (1998); *Tackett v. State Farm Fire & Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 265 (1995); *Garrison v. Medical Ctr. of Delaware*, Del. Supr., 581

A.2d 288, 293 (1989); *Mergenthaler v. Asbestos Corp. of America*, Del. Supr., 480 A.2d 647, 651 (1984); *Robb v. Pennsylvania R. Co.*, Del. Supr., 210 A.2d 709, 711 (1965)(no recovery for fright alone without evidence of physical consequences); *cf. Cummings v. Pinder*, Del. Supr., 574 A.2d 843, 845 (1990)(no showing of physical harm needed if intentional conduct causing emotional distress is outrageous); *Mattern v. Hudson*, Del. Super., 532 A.2d 85, 85-86 (1987)(same); *Ortiz v. Brandywine Chrysler-Plymouth, Inc.*, Del. Super., C.A. No. 647, 1977, Balick, J. (June 26, 1985)(same). *See also* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

14. EMOTIONAL DISTRESS

EFFECT OF PARTIES' RELATIONSHIP

If a fiduciary, acting in a relationship of trust and confidence, causes a client to suffer severe emotional distress as a result of outrageous conduct, the fiduciary will be liable for damages.

If you find that [***defendant's name***], in [***his/her***] role as [***plaintiff's name***]'s [__describe the fiduciary responsibility__], acted in an outrageous manner that caused [***plaintiff's name***] to suffer severe emotional distress, then you may award [***plaintiff's name***] damages for injuries arising from the emotional distress.

Source:
Brett v. Berkowitz, Del. Supr., 706 A.2d 509, 513 (1998); *Cummings v. Pinder*, Del. Supr., 574 A.2d 843, 845 (1990)(recovery for emotional distress arising out of outrageous conduct in attorney-client relationship).

14. EMOTIONAL DISTRESS

UNINTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

If someone's negligence causes fright or severe emotional distress to a person within the immediate area of physical danger created by that negligence, and if the person suffers physical consequences as a result of that severe emotional distress, then the injured person may recover damages.

Source:

New Haverford Partnership v. Stroot, Del. Supr., 772 A.2d 792 (2001)(landlord's negligence in maintaining apartments gave tenants a cause of action for resulting emotional and physical injuries); *Robb v. Pennsylvania Ry. Co.*, Del. Supr., 210 A.2d 709 (1965)(cause of action may lie in negligent infliction of emotional distress to person within immediate area of physical harm)(impact rule rejected); *cf. McClain v. Faraone*, Del. Super., 369 A.2d 1090, 1094 (1977)(in an action based on contract without related affirmative tortious physical act or conduct, there is no recovery for negligent or unintentional infliction of emotional distress).

14. EMOTIONAL DISTRESS

EMOTIONAL DISTRESS FROM INJURY NEGLIGENTLY CAUSED TO A CLOSE RELATIVE

A person may recover damages for fright or severe emotional distress suffered as a result of witnessing an injury negligently caused to a close relative only if:

(1) the person was in the immediate area of physical danger created by the negligent party; and

(2) the person suffered physical injury as a result of the emotional distress.

If you find that [***plaintiff's name***] suffered severe emotional distress and then physical injury from witnessing [__describe negligent act to a close relative__] and that [***plaintiff's name***] was within an immediate area of physical danger created by [***defendant's name***]'s negligence, then [***defendant's name***] is liable for damages.

Source:

Garrison v. Medical Ctr. of Delaware, Del. Supr., 581 A.2d 288, 293 (1989)(no recovery on claim of emotional distress without physical harm to claimant); *Mergenthaler v. Asbestos Corp. of America*, Del. Supr., 480 A.2d 647, 651 (1984)(same); *Robb v. Pennsylvania Ry. Co.*, Del. Supr., 210 A.2d 709, 711 (1965)(no recovery for fright alone without evidence of physical consequences); *Broomall v. Reed*, Del. Super., C.A. No. 79C-SE-16, Walsh, J. (July 9, 1981)(letter opinion)(holding recovery for physical injuries arising from emotional distress only in instance where claimant witnessed negligent conduct that injured a close relative); *Mancino v. Webb*, Del. Super., 274 A.2d 711, 714 (1974)(recovery by parent for emotional distress only where parent witnesses injury to child and parent is within zone of danger to child).

15. PREMISES LIABILITY

BUSINESS OWNER / LANDOWNER'S DUTY TO PUBLIC / BUSINESS INVITEES

A [business owner / landowner] owes a duty to the public to see that the parts of the premises ordinarily used by customers are kept in a reasonably safe condition. With this duty, the [business owner / landowner] is responsible for injuries that are caused by defects or conditions that the [business owner / landowner] had actual notice of or that could have been discovered by reasonably prudent inspection.

Under the law, a [business owner / landowner] is not an insurer of the safety of an invitee. Mere ownership does not make one liable for injuries sustained by persons who have entered on land, even though the owner has invited them to enter. The [business owner / landowner]'s liability to an invitee for unintentional injuries must be based on negligence; and the law does not presume that the owner was negligent merely because the invitee was injured while on the premises.

Source:

Jardel v. Hughes, Del. Supr., 523 A.2d 518, 525 (1987)(holding commercial property owner has duty to reasonably protect business invitees from criminal or tortious acts of third persons); *Howard v. Food Fair Stores, New Castle, Inc.*, Del. Supr., 201 A.2d 638, 640 (1964)(storekeepers); *Woods v. Prices Corners Shopping Ctr. Merchant's Ass'n*, Del. Super., 541 A.2d 574, 575 (1988); *Coker v. McDonald's Corp.*, Del. Super., 537 A.2d 549, 550 (1987); *DiSabatino Bros., Inc. v. Baio*, Del. Supr., 366 A.2d 508, 510 (1976); *Wilson v. Derrickson*, Del. Supr., 175 A.2d 400, 402 (1961). *See also Schorah v. B. & O. R. Co.*, D. Del., 596 F. Supp. 256, 259 (1984).

15. PREMISES LIABILITY

DUTY TO INSPECT AND DISCOVER DANGEROUS CONDITIONS FOR BENEFIT OF INVITEE

[***Plaintiff's name***] alleges that [***defendant's name***] failed to reasonably inspect and discover a dangerous condition on the premises.

An owner or occupier who has exclusive control over premises must inspect the premises and discover dangerous conditions that would be apparent to a person conducting a prudent inspection. An invitee is entitled to expect that the owner or occupant will take reasonable care to know the actual condition of the premises and, having discovered the condition, will either make it reasonably safe by repair or warn of the dangerous condition and the risk involved.

If you find that [***defendant's name***] failed to reasonably inspect the premises, failed to discover a dangerous condition that should have been discovered, or failed to warn of that condition, then you may find [***defendant's name***] negligent.

Source:

DiOssi v. Maroney, Del. Supr., 548 A.2d 1361, 1366 (1988)(adopting section 343 of the RESTATEMENT (SECOND) OF TORTS (1965)); *Coker v. McDonald's Corp.*, Del. Super., 537 A.2d 549, 550 (1987); *Hamm v. Ramunno*, Del. Supr., 281 A.2d 601, 603 (1971).

15. PREMISES LIABILITY

DUTY OF PROPERTY OWNER TO PROVIDE SAFE INGRESS AND EGRESS FROM ITS PROPERTY

A landowner has a duty to provide a business invitee with safe ingress and egress to its property. Ingress means the entrance or way onto the premises. Egress means the exit or way off the premises. Ordinarily, a landowner does not have a duty to warn an invitee of a danger located off the premises. But if the actual location of the hazard is immediately adjacent to the place of ingress or egress from the premises, the landowner has a duty to warn of the danger or protect against the danger in order to provide its invitees with a safe way onto and off the premises. If the danger, however, is so apparent that a business invitee can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning and the landowner has no further duty to warn or protect the invitee.

Source:

Wilmington Country Club v. Cowee, Del. Supr., 747 A.2d 1087, 1092 (2000); *Coleman v. National Railroad*, Del. Super., C.A. No. 89C-MY-2, Babiarz, J. (June 18, 1991)(landowner's duty to provide safe ingress and egress includes duty to warn of hazards on adjacent property to landowner); *Niblett v. Pennsylvania R. Co.*, Del. Super., 158 A.2d 580, 582 (1960)(obviousness of danger "so apparent" that notice of hazard was established as a matter of law); *cf. Maher v. Voss*, Del. Supr., 98 A.2d 499 (1953)(obviousness of the condition is ordinarily a question of fact for the jury).

15. PREMISES LIABILITY

BUSINESS INVITEE'S DUTY TO MAINTAIN PROPER LOOKOUT

A business invitee must maintain a proper lookout for hazards on the premises. This duty implies a duty to see things that are in plain view. It is negligent not to see what is plainly visible if there is nothing to obscure one's vision.

{*If applicable - food stores*}:

A customer has a right to assume that the floor in a store is safe to walk on and free from obstacles and defects that might cause a fall. A customer walking along a store aisle and glancing at shelves may be excused from keeping a constant lookout of the floor to observe a dangerous condition, particularly in light of the right to assume that the floor is safe.

If you find that [***plaintiff's name***] failed to maintain a proper lookout, you must find that [***he/she***] was contributorily negligent.

Source:

Howard v. Food Fair Stores, New Castle County Inc., Del. Supr., 201 A.2d 638, 642 (1964); *cf. Franklin v. Salminen*, Del. Supr., 222 A.2d 261, 262 (1966)(holding proprietor not liable to invitee after giving proper warning to invitee of a plainly visible hazard which invitee then chose to disregard).

15. PREMISES LIABILITY

DUTY OF PROPERTY OWNER TO ANTICIPATE CRIMES OF A THIRD PARTY

A property owner is not an insurer of public safety. But a property owner who invites the public onto the property for business purposes and who knows, or should know, of a history of criminal activity on the property must take reasonable care to protect the public from the crimes of others.

If you find that crimes previously occurred on the property, and that [***defendant's name***] knew, or should have known, about these crimes, and if you find that [***defendant's name***] failed to take reasonable care to protect [***plaintiff's name***] from similar crimes by another, then you must find [***defendant's name***] negligent.

Source:

Jardel Co. v. Hughes, Del. Supr., 523 A.2d 518, 525-26 (1987); *Craig v. A.A.R. Realty Corp.*, Del. Super., 576 A.2d 688, 692-95, *aff'd*, Del. Supr., 571 A.2d 786 (1989). *See also Furek v. University of Delaware*, Del. Supr., 594 A.2d 506, 508, 521-22 (1991)(university has duty to protect or warn students, as its invitees, against negligent or criminal acts of third persons); RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965).

15. PREMISES LIABILITY

DUTY OF PROPERTY OWNER TO ANTICIPATE ACTS OF THIRD PARTIES

A property owner is liable to a business invitee for injuries caused by the accidental, negligent or intentional acts of third persons if the property owner failed to exercise reasonable care either to discover that such acts were occurring or to protect against them. A property owner is liable if it knew or had reason to know from past experience that there was a likelihood of conduct on the part of third persons that was likely to endanger the safety of a business invitee, even though the property owner had no reason to expect such conduct on the part of a particular individual.

Source:

Furek v. University of Delaware, Del. Supr., 594 A.2d 506, 508, 521-22 (1991)(duty to protect students, as invitees, against negligent or criminal acts of third persons); *see also Jardel v. Hughes*, Del. Supr., 523 A.2d 518, 524 (1987); *Craig v. A.A.R. Realty Corp.*, Del. Super., 576 A.2d 688, 692-95, *aff'd*, Del. Supr., 571 A.2d 786 (1989); RESTATEMENT (SECOND) OF TORTS § 344A cmt.f (1965).

15. PREMISES LIABILITY

DUTY OF BUSINESS OWNER TO PROTECT AGAINST CRIME

Under the law, a business owner is not an insurer of the safety of an invitee. Mere ownership does not make one liable for injuries sustained by persons who have entered on business premises, even though the owner has invited them to enter. The business owner's liability to an invitee must be based on negligence; and the law does not presume that the owner was negligent merely because the invitee was injured while on the premises.

A business owner who invites the public onto its premises and who knows, or should know, that there is a significant risk of criminal activity at the business site must take reasonable care to protect an invitee from criminal activity.

If you find that there was a significant risk of criminal activity at [***business site***] and that [***defendant's name***] knew, or should have known of that risk and, if you find that [***defendant's name***] failed to take reasonable care to protect [***plaintiff's name***] from criminal activity, then you must find [defendant's name] negligent.

Source:

Harvey v. Super Fresh Food Markets, Inc. Del. Super., 95C-08-243 JEB (jury instructions)

15. PREMISES LIABILITY

EMPLOYEES ON PREMISES -- CONTRACTOR'S DUTY TO EMPLOYEES OF ANOTHER CONTRACTOR OR SUBCONTRACTOR

[***Plaintiff's name***] was an employee of [_____] on the premises under a contract with [***owner, contractor, or subcontractor's name***].

A contractor who is in control of the workplace must provide a safe environment to work. This does not mean that the contractor guarantees or insures the safety of the workplace. The extent of the contractor's duty is to exercise ordinary care, under the circumstances, to see that the workplace is reasonably safe.

If you find that [***defendant's name***] failed to perform this duty, then [***he/she/it***] was negligent.

Source:

Chesapeake & Potomac Tel. Co. v. Chesapeake Util. Co., Del. Supr., 436 A.2d 314, 321 (1981)(applying Maryland law); *DiSabitino Bros., Inc. v. Baio*, Del. Supr., 366 A.2d 508, 510 (1976); *Vadala v. Anchor Hocking Corp.*, Del. Supr., 346 A.2d 163, 164 (1975)(applying New Jersey law); *Seither v. Balbec*, Del. Super., C.A. No. 90C-11-257, Quillen, J. (1995); *Rabar v. E.I. duPont de Nemours & Co.*, Del. Super., 415 A.2d 499, 506 (1980).

OSHA

{**Comment**: *In* Toll Bros., Inc. v. Considine, *the Delaware Supreme Court held that relevant violations of the regulations of the Occupational Safety and Health Administration ("OSHA") are only evidence of negligence and not negligence per se, Del. Supr., 706 A.2d 493, 497-98 (1998). In* Delaware Elec. Coop. v. Duphily, *the Supreme Court stated that violations of the National Electrical Safety Code ("NESC"), or any other industry-wide standards, would constitute only evidence of negligence unless such standards were validly adopted by legislative directive as the law of the State, Del. Supr., 703 A.2d 1202, 1209 (1997)(dicta).*}

{**Comment**: *See Jury Instr. No. 8.10 -- Compliance With Government Regulations or Industry Standards Does Not Preclude a Finding of Negligence.*}

15. PREMISES LIABILITY

LANDOWNER'S DUTY TO EMPLOYEES OF AN INDEPENDENT CONTRACTOR

A landowner has no duty to protect an independent contractor's employees from hazards created by performance of the contracted work. Nor does a landowner have a duty to preserve the condition of the premises or to supervise the manner in which the work is performed unless the owner retains active control over how the work is carried out and the methods used.

Source:
O'Connor v. Diamond State Tel. Co., Del. Super., 503 A.2d 661, 663 (1985); *Seeney v. Dover Country Club Apartments*, Del. Super., 318 A.2d 619, 621 (1974).

15. PREMISES LIABILITY

GUEST STATUTE

Under the Landowner Guest Statute, a person who enters someone else's land as a guest without payment or as a trespasser cannot make a claim for any injuries or damages occurring on the premises unless the owner or occupier either intentionally caused the injuries or damages, or they were caused by the owner's or occupier's willful or wanton disregard of the rights of others.

You must consider only whether [***plaintiff's name***] has proved that [***defendant's name***] intentionally, willfully, or wantonly disregarded the rights of [***plaintiff's name***].

Source:

25 *Del. C.* § 1501; *Fox v. Fox*, Del. Supr., 729 A.2d 825, 828 (1999)(adopting Restatement (Second) of Torts §343B and holding a minor licensee is not barred by the Guest Premises Statute from pursuing a claim based upon attractive nuisance); *Stratford Apts., Inc. v. Fleming*, Del. Supr., 305 A.2d 624, 625-26 (1973)(construing Delaware Guest Statute). *See Jardel v. Hughes*, Del. Supr., 523 A.2d 518, 529-30 (1987)(discussing intentional, willful, and wanton conduct).

15. PREMISES LIABILITY

DUTY OF OWNER OR OCCUPIER OF PREMISES

TO A LICENSEE OR TRESPASSER

{**Source**: *A licensee or a trespasser is a "guest without payment" within the scope of the Delaware Guest Statute. See Jury Instr. No. 15.8.*}

Source:

25 *Del. C.* § 1501; *Fox v. Fox*, Del. Supr., 729 A.2d 825, 828 (1999)(adopting Restatement (Second) of Torts §343B and holding a minor licensee is not barred by the Guest Premises Statute from pursuing a claim based upon attractive nuisance); *Acton v. Wilmington & Northern R. Co.*, Del. Supr., 407 A.2d 204, 205-06 (1979); *Facciolo v. Facciolo Constr. Co.*, Del. Supr., 317 A.2d 27, 28 (1974); *Slovin v. Gauger*, Del. Supr., 200 A.2d 565, 567 (1964); *Maher v. Voss*, Del. Super., 84 A.2d 527, 528-29 (1951), *aff'd*, Del. Supr., 98 A.2d 499 (1953).

15. PREMISES LIABILITY

LIABILITY TO CHILDREN

FOR HIGHLY DANGEROUS ARTIFICIAL CONDITIONS

A possessor of land is liable to young children on the land for bodily harm caused by a structure or other artificial condition on the land, if:

(a) the place is one that the possessor knows or should know that young children are likely to trespass on;

(b) the possessor knows or should know that the structure or condition involves an unreasonable risk of death or serious bodily harm to young children;

(c) the children, because of their youth, do not discover the condition or realize the risk involved in meddling in it or in coming within the area made dangerous by it, and

(d) the usefulness to the possessor of maintaining the condition is slight as compared to the risk to young children.

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

If you find that all of these elements exist, then you must find for [***plaintiff's name***].

Source:

Fox v. Fox, Del. Supr., 729 A.2d 825, 828 (1999)(adopting Restatement (Second) of Torts §343B and holding a minor licensee is not barred by the Guest Premises Statute from pursuing a claim based upon attractive nuisance); *Coe v. Schneider*, Del. Supr., 424 A.2d 1, 2 (1980); *Schorah v. Carey*, Del. Supr., 331 A.2d 383, 384 (1980); *Johnson v. Delmarva Power & Light Co.*, Del. Super., 312 A.2d 634, 636 (1973); *Moran v. Delaware Racing Ass'n*, Del. Super., 218 A.2d 452, 453-54 (1966).

15. PREMISES LIABILITY

DUTY OF OWNER OR OCCUPIER OF BUSINESS

TO KEEP PREMISES SAFE FROM HAZARDS OF SNOW AND ICE

A [business owner / occupier] has a duty to keep the premises, including sidewalks and entry ramps, reasonably safe from the hazards associated with the natural accumulation of ice and snow. Although a [business owner / occupier] is not an insurer of the safety of its invitees, the owner must take reasonable steps to make the premises safe. The [owner / occupier] of the premises may relieve itself of liability, even though an invitee may be injured on the premises, by taking reasonable steps to make the area safe. The [business owner / occupier] is entitled to await the end of the snowfall and a reasonable time thereafter to take action to make the premises safe from the hazardous condition caused by the accumulation of ice and snow. It is not enough, however, merely to warn an invitee of the hazard.

If you find that [***name of business owner / occupier***] failed to take reasonable steps to keep the premises free from the hazard of snow and ice accumulations, then you must find [***name of business owner / occupier***] negligent.

Source:

Monroe Park Apts. Corp. v. Bennett, Del. Supr., 232 A.2d 105 (1967)(apartment building common areas); *Young v. Saroukos*, Del. Super., 185 A.2d 274, 282 (1962)(sidewalk leading to apartment building); *Woods v. Prices Corner Shopping Center*, Del. Super., 541 A.2d 574 (1988)(duty of owner or occupier of business to keep premises safe from hazards of snow and ice); *Coker v. McDonald's Corp.*, Del. Super., 537 A.2d 549, 550 (1987)(ice on walkway leading to restaurant).

15. PREMISES LIABILITY

LIENS ON PROPERTY OF ANOTHER

A Delaware statute provides that certain workers and service providers have a lien on items and may detail them to secure payment of a fee or price. Those entitled to the lien are as follows:

> "[a]ny hotelkeeper, innkeeper, garage owner, auction service or other person who keeps a livery, boarding stable, garage, airport, marina, or other establishment and, for price or reward at such . . . [a place] . . . , furnishes food or care for any horse or has the custody or care of any carriage, cart, wagon, sleigh, motor vehicle, trailer, moped, boat, airplane, or other vehicle or any harness, robes or other equipment for the same or [who] makes repairs, auctions, performs labor upon, furnishes services, supplies materials, stores, safekeeps or tows any . . . [of these items] . . . for the same . . . ."

This statute creates a right to retain property through reasonable means. It does not create a right to use physical force.

Source:
25 *Del. C.* § 3901; *Brennan v. Mulvena*, Del. Super., C.A. No. 94C-01-058 SCD, Del Pesco, J. (1996).

16. FRAUD AND DECEIT

FRAUD

Fraud consists of the following five elements:

1) the false representation of a fact that is important to another;

2) the knowledge or belief that this representation was false, or was made with reckless indifference to the truth, or [__had a special duty to know whether the representation was false__];

3) the intent to induce [***plaintiff's name***] to act on the false representation, or to decline to act;

4) the fact that [***Plaintiff's name***] acted, or declined to act, in justifiable reliance on the false representation; and

5) damage to [***Plaintiff's name***] as a result of this reliance.

A false representation may be asserted by words or by conduct. A fact is important if it would cause a reasonable person to decide to act in a particular way, or if the maker of the misrepresentation knew another person would regard it as important.

If you find that [***plaintiff's name***] has proved all of the above elements by a preponderance of the evidence, then [***defendant's name***] is liable for fraud.

Source:

Gaffin v. Teledyne, Inc., Del. Supr., 611 A.2d 467, 472 (1992); *Stephenson v. Capano Dev., Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983); *Harmon v. Masoneilan Intern, Inc.*, Del. Supr., 442 A.2d 487, 499 (1982); *Scott-Douglas Corp. v. Greyhound Corp.*, Del. Super., 304 A.2d 309, 317 (1973)(applying Michigan law); *Twin Coach Co. v. Chance Vought Aircraft, Inc.*, Del. Super., 163 A.2d 278, 283-84 (1960).

See also PROSSER & KEETON ON TORTS § 289 (4th ed. 1974)(the question of duty is a matter of law for the court and where the misrepresentation is in the nature of a commercial transaction, the jury will only decide those issues of fact which are in dispute); RESTATEMENT (SECOND) OF TORTS §§ 525, 530, 531 (1965).

16. FRAUD AND DECEIT

EXPRESSION OF OPINION

An expression of an opinion or a speculation about future events, when clearly made as such, is not considered fraud or misrepresentation even if the opinion or speculation turns out to be untrue. But if an opinion or speculation is false and made with the intent to deceive, then it is fraudulent just as a misstatement of fact is fraudulent.

Source:
Consolidated Fisheries Co. v. Consolidated Solubles Co., Del. Supr., 112 A.2d 30, 37 (1955); *Scott-Douglas Corp. v. Greyhound Corp.*, Del. Super., 304 A.2d 309, 317 (1973); *Traylor Engineering & Mfg. Co. v. National Container Corp.*, Del. Super., 70 A.2d 9, 13-14 (1949).

16. FRAUD AND DECEIT

INTENTIONAL CONCEALMENT OF FACTS

Fraud does not merely consist of overt misrepresentations. Fraud may also occur when someone deliberately conceals facts important to a transaction, causing [***plaintiff's name***] to rely on the deception to [***his/her/its***] detriment. This concealment can occur by a person's silence in the face of a duty to disclose the facts or by some action taken to prevent [***plaintiff's name***] from discovering the facts important to the transaction.

Source:
Gaffin v. Teledyne, Inc., Del. Supr., 611 A.2d 467, 472 (1992); *Stephenson v. Capano Dev., Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983); *Lock v. Schreppler*, Del. Super., 426 A.2d 856, 860-61 (1981).

16. FRAUD AND DECEIT

NONDISCLOSURE OF FACTS ALREADY KNOWN TO PLAINTIFF

If [***plaintiff's name***] was aware of the true facts of the transaction, even if they were concealed by the other party, or if [***plaintiff's name***] did not rely on the concealment of these facts, then there is no fraud.

Source:

Merrill v. Crothall-American, Inc., Del. Supr., 606 A.2d 96, 100 (1992)(knowledge by alleged victim of true facts, which are misrepresented by defendant, negates claim for fraud); *Schmeusser v. Schmeusser*, Del. Supr., 559 A.2d A.2d 1294, 1295-96 (1989); *Nicolet, Inc. v. Nutt*, Del. Supr., 525 A.2d 146, 149 (1987)(no need to disclose material fact or opinion unless duty to speak exists); *Lock v. Schreppler*, Del. Super., 426 A.2d 856, 860-61 (1981)(although there may be no duty to speak, once a person undertakes to speak, a duty to make full and fair disclosure of all material facts and matters arises).

16. FRAUD AND DECEIT

NEGLIGENT MISREPRESENTATION - CONSUMER FRAUD ACT

Under the Delaware Consumer Fraud Act, if a person makes a false representation or conceals an important fact from another in connection with the advertising or sale of any merchandise, and intends that the other person will rely on it, the person making the false representation may be liable. This is so even if the person making the representation was unaware that it was false or that an important fact had been concealed. This is known as negligent misrepresentation.

If you find that [***defendant's name***] falsely represented that [__describe alleged misrepresentation or concealment__] and intended that [***plaintiff's name***] would rely on this representation, then [***defendant's name***] is liable for negligent misrepresentation.

{**Comment**: *The Consumer Fraud Act is limited to transactions involving the sale or advertising of merchandise, including real estate transactions.*}

Source:

6 *Del. C.* §§ 2511 *et seq.*; *Stephenson v. Capano Dev., Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983); *Nash v. Hoopes*, Del. Super., 332 A.2d 411, 413 (1975); *In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 28-29, *aff'd sub nom. Brandywine Volkswagen, Ltd. v. State*, 312 A.2d 632, 634 (1973).

17. INSURANCE

INSURANCE AGENT'S DUTY OF CARE AND DUTY TO ACT IN GOOD FAITH

An insurance agent is generally required to exercise reasonable care, skill, and diligence in his or her business. Under Delaware law, a person licensed to sell insurance has a duty to transact business in accordance with the provisions of the Delaware Insurance Code and to

> conduct such business, at all times, in accordance with the highest standards of fidelity, good faith and sound business principles. Each licensee shall conduct business hereunder to insure that each transaction undertaken will, to the extent of the licensee's capabilities, meet the needs of the insurance-buying public.

In this case, [***plaintiff's name***] alleges that [***defendant's name***] breached [***his/her***] duty to [__specify duty under 18 *Del. C.* § 1717, etc.__]. If you find that [***defendant's name***] breached this duty, which I shall define shortly, and if you find [***defendant's name***]'s breach caused [***plaintiff's name***] to suffer injury or loss, then you may find [***defendant's name***] liable for damages.

Source:

18 *Del. C.* § 1718 (licensed insurance personnel); 18 *Del. C.* § 1704 (brokers); *Grand Ventures v. Whaley*, Del. Super., 622 A.2d 655, 665 (1992); *Insurance Co. of North America v. Waterhouse*, Del. Super., 424 A.2d 675, 677 (1980). *See generally* 18 *Del. C.* § 2301 *et seq.* (Unfair Practices in the Insurance Business).

17. INSURANCE

{**Comment**: *Refer to particular provision(s) in the Code for text of instruction.*}

Source:

See 18 *Del. C.* § 2304(16) (Unfair Claim Settlement Practices).

17. INSURANCE

{**Comment**: *Refer to particular provision(s) in the Code for text of instruction.*}

Source:

See 18 *Del. C.* § 2304(16) (Unfair Claim Settlement Practices).

17. INSURANCE

{**Comment**: *Refer to particular provision(s) in the Code for text of instruction.*}

Source:

See 18 *Del. C*. § 2304(16)(f)-(i).

17. INSURANCE

{**Comment**: *Refer to particular provision(s) in the Code for text of instruction.*}

Source:

See generally 18 *Del. C.* §§ 903, 2720, 2726, 3504, and 6301 *et seq.*; *Kent General Hosp., Inc. v. Blue Cross and Blue Shield of Delaware, Inc.*, 442 A.2d 1368, 1370-72 (1982)(provisions in policy contract prohibiting assignment of benefits not void or unenforceable as a matter of public policy); *Meyers v. Meyers*, Del. Supr., 408 A.2d 279, 280 (1979)(irrevocable grant of rights to beneficiary valid); *Wilmington Trust Co. v. Barry*, Del. Super., 338 A.2d 575, 577, *aff'd*, Del. Supr., 359 A.2d 664 (1975)(insurance contracts that exempt proceeds from liability for debt of insured or beneficiary are valid); *Maneval v. Luthern Broth.*, Del. Super., 281 A.2d 502, 504 (1971)(proceeds of life insurance policy not available to beneficiary who killed insured).

17. INSURANCE

GENERAL DUTY OF INSURER TO ITS INSURED

TO HANDLE CLAIMS IN GOOD FAITH

An insurance company has a contractual obligation to investigate, process, and defend claims brought by or against its insured. An insurer violates its obligations to its insured if it acts in bad faith -- meaning that the insurer [__acts / fails to act__] without reasonable justification.

Source:

See 18 *Del. C.* § 2304(16); *Pierce v. International Ins. Co. of Illinois*, Del. Supr., 671 A.2d 1361, 1364-66 (1996)(under workers' compensation law, employer's carrier has duty to act in good faith to beneficiary-employee); *Tackett v. State Farm Fire & Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 262-64 (1995)(Insurance carrier's duty to act in good faith in first party disputes).

17. INSURANCE

INSURANCE COMPANY'S DUTY TO SETTLE IN GOOD FAITH

An insurance company has a duty to act in good faith to make a reasonable settlement of a claim within the insured's policy limits. An insurer fails to act in good faith when it refuses to offer to settle within the policy limits, and when this refusal is without reasonable justification.

The fact that an award is in excess of policy limits or is more than the insurance company's evaluation does not establish that the insurance company acted in bad faith. It is not bad faith if the insurance company has a good defense, has acted reasonably, or has reasonable belief that the plaintiff's claim is not worth more than the policy limits.

Source:

21 *Del. C.* § 2304(16); *see also Stilwell v. Parsons*, Del. Supr., 145 A.2d 397, 402 (1958)(insurance carrier's duty of good faith and care in settlement negotiations).

17. INSURANCE

INSURED'S DUTY TO READ POLICY

The policyholder has a duty to read and understand the contents of an insurance policy.

Source:

See Graham v. State Farm Mut. Auto Ins. Co., Del. Supr., 565 A.2d 908, 913 (1989)(general duty to read contract and a party's failure to read terms of insurance contract will not justify later disavowal of an unfavorable term); *Sharpless-Hendler Ice Cream Co. v. Davis*, Del. Ch., 155 A. 247 (1931)(contract executed by illiterate person without being misled or demanding a reading, and where other party had no knowledge of illiteracy, held valid and binding); *Alabi v. DHL Airways, Inc.*, Del. Super., 583 1358, 1362 (1990)(duty to read is a matter of general contract law); *Marine v. Slayton*, Del. Comm. Pl., 1 Del. Cas. 116, 117 (1797)(when instrument was executed by unlettered man, it was necessary that it be read and fairly explained to him).

See also Reynolds v. Equitable Life Assur. Soc. of U.S., Pa. Super., 15 A.2d 464 (1940)(insured has a duty to read and understand the contents of policy); *but see In re McGinnis' Appeal*, Pa. Super., 152 A.2d 784, 786-87 (1959)(duty to read overcome by insurer's duty to re-issue previously endorsed policy without clerical errors); *accord Bandura v. Fidelity & Guar. Life Ins. Co.,* W.D. Pa., 443 F. Supp. 829, 832 (1978).

17. INSURANCE

INSURED'S DUTY TO COOPERATE WITH INSURANCE COMPANY

The insurance policy in question provides:

[__insert language relating to insured's duty to cooperate__]

If you find that [***policyholder's name***] failed to cooperate with [***insurance carrier's name***] on an important matter and that [***insurance carrier's name***] was prejudiced in its ability to investigate, evaluate, or defend the claim, then [***policyholder's name***] has breached its contract and is precluded from recovering under the policy.

{**Comment**: *Failure to cooperate does not preclude the insured being entitled to coverage under the Delaware's Financial Responsibility Act. However, the insured's failure to cooperate to the detriment of the insurance company will preclude coverage for all amounts above the amount required by the financial responsibility laws of this State.*}

Source:
State Farm Mut. Auto. Ins. Co. v. Johnson, Del. Supr., 320 A.2d 345, 346-47 (1974).

17. INSURANCE

BAD FAITH BY INSURANCE COMPANY IN FIRST-PARTY CLAIMS

[***Plaintiff's name***] claims that [***defendant insurance company's name***] has breached its contract by failing to pay [***plaintiff's name***]'s claim for [__describe nature of claim__]. To recover, [***plaintiff's name***] must show that although [***he/she/it***] has complied with all policy requirements, [***defendant's name***] hasn't paid under the policy.

Not every refusal to pay a claim constitutes a breach of an insurance policy. You must determine whether, at the time [***defendant's name***] denied coverage, there were facts or circumstances known to [***defendant's name***] that created a legitimate dispute over its liability under the policy. If you find that [***defendant's name***] refused to pay the claim without any reasonable justification, you may find that [***defendant's name***] acted in bad faith. Bad faith means that there were no facts or circumstances known to [***defendant's name***] that created a legitimate dispute over [***plaintiff's name***]'s claim.

If you find that [***defendant's name***]'s breach of the insurance policy was malicious and done with a reckless indifference to the insured, you may impose punitive damages.

Source:

Pierce v. International Ins. Co. of Am., Del. Supr., 671 A.2d 1361, 1367 (1996)(under workers' compensation law, employer's carrier has duty to act in good faith to beneficiary-employee); *Tackett v. State Farm Fire & Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 262-63 (1995); *Casson v. Nationwide Ins. Co.*, Del. Super., 455 A.2d 361, 368-69 (1982).

17. INSURANCE

{**Comment**: *Please refer to appropriate section(s) in the Code for the citation necessary to an instruction if a jury question is raised.*}

Source:

See generally 18 *Del. C.* § 2301 *et seq*. (unfair practices, especially §§ 2304, 2305); 18 *Del. C.* § 2701 *et seq*. (insurance contracts). Please refer to the Code for specific provisions and subject areas.

Graham v. State Farm Mut. Auto Ins. Co., Del. Supr., 565 A.2d 908, 912 (1989)(insurance policy is generally contract of adhesion); *Hallowell v. State Farm Mut. Auto Ins. Co.*, Del. Supr., 443 A.2d 925, 926-27 (1982)(insurance contract should be read in accordance with reasonable expectations of the purchaser so far as language of the policy permits if contract is one of adhesion); *cf. Playtex FP, Inc. v. Columbia Cas. Co.*, Del. Super., 609 A.2d 1087, 1092 (1991)(doctrine of reasonable expectations does not apply to interpretation of negotiated insurance contract that was not a contract of adhesion); *Goodman v. Continental Cas. Co.*, Del. Super., 347 A.2d 662, 664 (1975)(ordinary rules of contract law apply to insurance policy unless otherwise provided by statute).

17. INSURANCE

{**Comment**: *Interpretation or construction of the terms and meaning of a policy is generally a question of law for the court to decide.*}

Source:

See 18 *Del. C.* chs. 23, 27; *Hallowell v. State Farm Mut. Auto Ins. Co.*, Del. Supr., 443 A.2d 925, 926-27 (1982)(parties bound by plain meaning of clear and unambiguous language of insurance contract); *accord Rhone-Polenc Basic Chemicals Co. v. American Motorists Ins. Co.*, Del. Supr., 616 A.2d 1192, 1195-96 (1992). *Calloway v. Nationwide Mut. Auto Ins. Co.*, Del. Super., 248 A.2d 617, 69 (1968)(exclusions are as binding upon insured as are policy limits and exclusionary terms must be strictly construed against insurer); *Lamberton v. Travellers Indem. Co.*, Del. Super., 325 A.2d 104, 106 (1974), *aff'd*, Del. Supr., 346 A.2d 167 (1975)(strict construction of terms proper only where ambiguity is found).

17. INSURANCE

{**Comment**: *Interpretation or construction of the terms and meaning of a policy is generally a question of law for the court to decide.*}

Source:

18 *Del. C*. §§ 2304(18)&(20), 2740; *Hallowell v. State Farm Mut. Auto Ins. Co.*, Del. Supr., 443 A.2d 925, 926-27 (1982)(court will not twist words of clear and unambiguous language in order to construe insurance contract, but ambiguous contract terms must be construed most strongly against insurer as drafter of the policy); *Cheseroni v. Nationwide Mut. Ins. Co.*, Del. Super., 402 A.2d 1215, 1217 (1979), *aff'd*, Del. Supr., 410 A.2d 1015 (1980)(ambiguity exists only where two or more reasonable interpretations are possible); *Lamberton v. Travellers Indem. Co.*, Del. Super., 325 A.2d 104, 106 (1974), *aff'd*, Del. Supr., 346 A.2d 167 (1975)(strict construction of terms proper only where ambiguity is found).

UNINSURED/UNDERINSURED CLAIMS

The defendant, [***insurer's name***], has issued a policy of insurance to the plaintiff. The policy of insurance obligates the defendant to compensate the plaintiff for damages which are proximately caused by the negligence of an [***uninsured/underinsured***] motorist. The parties have stipulated that [***tortfeasor's name***] was an [***uninsured/underinsured***] motorist at the time of the accident.

Therefore, if you find that the [***uninsured/underinsured***] motorist was negligent and that such negligence was the proximate cause of injury to the plaintiff, then you must award damages to the plaintiff.

Source:
18 *Del. C.* §3902; *Hurst v. Nationwide Mut. Ins. Co.*, Del. Supr., 652 A.2d 10 (1995).

18. AGENCY

AGENT'S NEGLIGENCE IMPUTED TO PRINCIPAL

If you find that [***plaintiff's name***]'s injuries were the result of a negligent act committed by an [__agent / employee__] of [***defendant's name***] while acting within the scope of [***his/her***] [__employment / agency__], then that negligence is the legal responsibility of [***defendant's name***].

[An agent is one who acts for another, known as a principal, on the principal's behalf and subject to the principal's control and consent.]

Source:

Fisher v. Townsends, Inc., Del. Supr., 695 A.2d 53 (1997)(discussing in great detail the various agency relationships); *Billops v. Magness Constr. Co.*, Del. Supr., 391 A.2d 196, 198-99 (1978); *Eastern Memorial Consultants, Inc. v. Greenlawn Memorial Park, Inc.*, Del. Supr., 364 A.2d 821 (1976)(principal is not employer of a sub-agent hired by principal's agent); *Fields v. Synthetic Ropes, Inc.*, Del. Supr., 215 A.2d 427, 432-33 (1965); *Richardson v. John T. Hardy & Sons, Inc.*, Del. Supr., 182 A.2d 901, 902-03 (1962). *See also* RESTATEMENT (SECOND) OF AGENCY § 1 (1983).

AGENCY ADMITTED

It has been admitted in legal documents filed in this case that, at all times relevant to this litigation, [***employee's name***] was an employee acting within the scope of employment and was the agent of [***employer's name***].

As a matter of law, therefore, [***employer's name***] is equally responsible with [***employee's name***] for any acts or omissions [***employee's name***] may have committed at the time of the incident.

Source:

Fields v. Synthetic Ropes, Inc., Del. Supr., 215 A.2d 427, 432-33 (1965).

18. AGENCY

BORROWED SERVANT

Delaware's Workers' Compensation Law provides that a person injured on the job must accept workers' compensation and may not file a liability claim against the employer.

In this case, [***plaintiff's name***] was an employee of [_____A_____]. [***Defendant's name***] claims that [***plaintiff's name***] acted as a loaned or borrowed employee of [_____B_____] at the time of the injury. A loaned or borrowed employee who is temporarily acting under the control of a second employer is considered the second employer's employee.

Factors to consider in determining whether an individual is acting as the employee of a second employer include:

(1) The terms of any agreement between the second employer and the alleged employee, and the extent of control that second employer could exert over the alleged employee. A requirement that the work of the alleged employee be performed according to standards and specifications imposed by a second employer is not sufficient to establish control. Instead, you must examine the provisions of any agreement about the manner or means by which the work is to be performed.

(2) Whether alleged employee is engaged in an occupation or business distinct from the second employer.

(3) Whether at the jobsite, the work specified in the contract is usually done under the direction of the contracting party or by a specialist without supervision.

(4) The independent skill required by the alleged employee's area of work.

(5) Whether the second employer paid the wages of the alleged employee while working on the particular job.

(6) Whether the second employer hired and could fire the alleged employee while working on the particular job.

(7) Whether the second employer controlled the manner and performance of the alleged employee while on the job. Of all the factors, this is the most important.

(8) Whether the second employer supplied the tools and place of work to the alleged employee.

(9) Whether the alleged employee had an opportunity to profit under the agreement with the second employer.

(10) The length of the relationship between alleged employee and the second employer.

You must determine whether, at the time of the injury, [***plaintiff's name***] was acting in the business of and under the direction of the general employer, [____A____], or the second employer, [____B____].

Source:

19 *Del. C.* §§ 2304, 2311; *Fisher v. Townsends, Inc.*, Del. Supr., No. 308, 1996, Holland, J. (June 11, 1997)(discussing in great detail agency relationships); *Porter v. Pathfinder Services, Inc.*, Del. Supr., 683 A.2d 40, 42 (1996)(holding determination of an employer-employee relationship is a matter of law for the court to decide); *Kofron v. Amoco Chemicals Corp.*, Del. Supr., 441 A.2d 226, 231 (1982)(exclusivity of Worker's Compensation Law); *Dickinson v. Eastern R.R. Builders, Inc.*, Del. Supr., 403 A.2d 717, 721 (1979)(in context where contractor-subcontractor both exercise control over employee at job site, injured employee's rights to compensation fall upon subcontractor); *Faircloth v. Rash*, Del. Supr., 317 A.2d 871, 872-73 (1974); *Lester C. Newton Trucking Co. v. Neal*, Del. Supr., 204 A.2d 393, 395 (1964); *Richardson v. John T. Hardy & Sons, Inc.*, Del. Supr., 182 A.2d 901, 902-03 (1962); *Weiss v. Security Storage Co.*, Del. Super., 272 A.2d 111, 115 (1970), *aff'd*, Del. Supr., 280 A.2d 534 (1971); *Burns v. Mumford and Miller Concrete, Inc.*, Del. Super., C.A. No. 92C-10-271, Del Pesco, J. (June 15, 1997)(jury charge). *See also* RESTATEMENT (SECOND) OF AGENCY § 227.

18. AGENCY

EMPLOYEE INJURED BY CO-WORKER

Delaware's Workers' Compensation Law provides that a person injured on the job by a co-worker must accept workers' compensation and may not file a liability claim against the person's employer or the co-worker.

In this case [***plaintiff's name***] was an employee of [_____X_____]. [***Defendant's name***] claims that [***alleged co-worker's name***] was also an employee of [_____X_____].

A person who is temporarily acting under the control of another employer may be considered that employer's employee even though the person generally works for someone else. Factors to consider in determining whether an individual is acting as the employee of a given employer at a particular time and place include:

(1) The terms of any agreement between the employer and the alleged employee, and the extent of control that the employer could exert over the alleged employee. A requirement that the work of the alleged employee be performed according to standards and specifications imposed by the employer is not sufficient to establish control. Instead, you must examine the provisions of any agreement about the manner or means by which the work is to be performed.

(2) Whether alleged employee is engaged in an occupation or business distinct from the employer.

(3) Whether at the jobsite, the work specified under the contract is usually done under direction of the contracting party or by a specialist without supervision.

(4) The independent skill required by the alleged employee's area of work.

(5) Whether the employer paid the wages of the alleged employee while working on the particular job.

(6) Whether the employer hired and could fire the alleged employee while working on the particular job.

(7) Whether the employer controlled the manner and performance of the alleged employee while on the job. Of all the factors, this is the most important.

(8) Whether the employer supplied the tools and place of work for the alleged employee.

(9) Whether the alleged employee had an opportunity to profit under the agreement with the employer.

(10) The length of the relationship between alleged employee and the employer.

You must determine whether or not [***alleged co-worker's name***] was acting in the business of and under the direction of [_____X_____] at the time of the injury to [***plaintiff's name***].

Source:

19 *Del. C.* §§ 2304, 2311; *Fisher v. Townsends, Inc.*, Del. Supr., No. 308, 1996, Holland, J. (June 11, 1997)(discussing in great detail agency relationships); *Porter v. Pathfinder Services, Inc.*, Del. Supr., 683 A.2d 40, 42 (1996)(holding determination of an employer-employee relationship is a matter of law for the court to decide); *Kofron v. Amoco Chemicals Corp.*, Del. Supr., 441 A.2d 226, 231 (1982)(exclusivity of Worker's Compensation Law); *Dickinson v. Eastern R.R. Builders, Inc.*, Del. Supr., 403 A.2d 717, 721 (1979)(in context where contractor-subcontractor both exercise control over employee at job site, injured employee's rights to compensation fall upon subcontractor); *Faircloth v. Rash*, Del. Supr., 317 A.2d 871, 872-73 (1974); *Richardson v. John T. Hardy & Sons, Inc.*, Del. Supr., 182 A.2d 901, 902-03 (1962); *Ward v. GMC*, Del. Super., 431 A.2d 1277, 1280 (1981); *Weiss v. Security Storage Co.*, Del. Super., 272 A.2d 111, 115 (1970), *aff'd*, Del. Supr., 280 A.2d 534 (1971); *Burns v. Mumford and Miller Concrete, Inc.*, Del. Super., C.A. No. 92C-10-271, Del Pesco, J. (June 15, 1997)(jury charge); *Lester C. Newton Trucking Co. v. Neal*, Del. Super., 204 A.2d 393, 395 (1964). *See also* RESTATEMENT (SECOND) OF AGENCY § 227.

18. AGENCY

WHEN EMPLOYEE TENDS TO PERSONAL AFFAIRS AND

AT THE SAME IS ACTING WITHIN SCOPE OF EMPLOYMENT

If an employee is acting within the scope of [***his/her***] employment, the employer is liable for any acts or omissions that occur during the course of employment. But if an employee acts for strictly personal reasons, then the employer is not liable.

In this case, you must determine whether [***employee's name***] acted within the scope of [***his/her***] employment when [***he/she***] [__describe disputed activity of employee__].

(1) Conduct by an employee is within the scope of employment if, but only if:

- the conduct is of a type that the employee is hired to perform;
- the conduct occurs substantially within the authorized time and space limits of the work; and
- the conduct is motivated, at least in part, by an intent to serve the employer.

(2) Conduct by an employee is not within the scope of employment if it is different in kind from what is authorized, far beyond the authorized time or space limits, or too little motivated by an intent to serve the employer.

Source:

Fisher v. Townsends, Inc., Del. Supr., No. 308, 1996, Holland, J. (June 11, 1997)(discussing in great detail agency relationships); *Wilson v. JOMA, Inc.*, Del. Supr., 537 A.2d 187, 189 (1988), *appeal after remand*, 561 A.2d 993 (1989)(employee acting with dual purpose to serve interests of employer and self may be within scope of employment); *Barnes v. Towlson*, Del. Super., 405 A.2d 137, 139-40 (1979)(employee simply driving to work not acting within the scope of employment); *Johnson v. E.I. duPont de Nemours & Co.*, Del. Super., 182 A.2d 904, 905 (1962)(trip home for lunch outside the scope of employee's employment).

18. AGENCY

INDEPENDENT CONTRACTOR - DEFINITION

Under Delaware law, an independent contractor is one that exercises independent judgment and contracts to do a piece of work according to its own methods without being subject to the owner's control. You must consider several factors to determine whether a party is an independent contractor. The strongest test is whether the [__contractor, owner, employer, etc.__] exercised control over the work itself. Factors that indicate control include:

(1) The terms of any agreement between [***defendant's name***] and [***alleged independent contractor's name***] and the extent of control that [***defendant's name***] may exert over [***alleged independent contractor's name***]. A requirement that the work be performed according to standards and specifications imposed by the owner is not sufficient to establish control. Instead, you must examine the provisions about the manner or means by which the work is to be performed.

(2) Whether [***alleged independent contractor's name***] is engaged in an occupation or business distinct from defendant.

(3) Whether at [____location of the work done____] and its surroundings, the work to be done under the contract is usually done under direction of the contracting party or by a specialist without supervision.

(4) The independent skill required by [***alleged independent contractor's name***]'s area of work.

(5) Who pays the wages to the individual employees of [***alleged independent contractor's name***].

(6) Who can hire and fire the individual employees.

(7) Who can control individual employees on the job in the manner and performance of their work. Of all the factors, this is the most important.

(8) Who supplies the tools and place of work to [***alleged independent contractor's name***]'s employees.

(9) Whether [***alleged independent contractor's name***] had an opportunity to profit under the agreement.

(10) The length of the relationship between [***alleged independent contractor's name***] and [***defendant's name***].

These are all factors that may determine the extent of control under the definition of an independent contractor. You must examine these factors and any others you believe to be relevant within the context that I have just supplied to you. No one factor is determinative. It is the total relationship that governs. You must then determine whether [***alleged independent contractor's name***] was an independent contractor or an [__agent / employee__] of [***defendant's name***].

{**Comment**: *If vicarious liability of a third party (usually an owner or contractee) is an issue in the case, and the jury makes a finding that the tortfeasor is an independent contractor, before the third party may be relieved of liability, the jury must make a second finding that the tortfeasor was not an agent of the third party. To make this finding, an instruction on whether the tortfeasor/independent contractor is an agent/non-agent of the owner/contractee will be required. On the verdict sheet, special interrogatories should direct the jury to make the appropriate findings. See* Fisher v. Townsends, Inc., *Del. Supr., 695 A.2d 53 (1997).*}

Source:

Fisher v. Townsends, Inc., Del. Supr., 695 A.2d 53 (1997)(discussing in detail agency relationships); *O'Connor v. Diamond State Tel. Co.*, Del. Supr., 503 A.2d 661, 663 (1985); *Chesapeake and Potomac Tel. Co. of Maryland v. Chesapeake Util. Corp.*, Del. Supr., 436 A.2d 314, 324-25 (1981)(applying Maryland law); *Barnes v. Towlson*, Del. Super., 405 A.2d 137, 138-39 (1979); *Melson v. Allman*, Del. Supr., 244 A.2d 85, 87 (1968); *E.I. duPont de Nemours & Co. v. I.D. Griffith, Inc.*, Del. Supr., 130 A.2d 783, 784 (1957); *Schagrin v. Wilmington Med. Ctr., Inc.*, Del. Super., 304 A.2d 61 (1973). *See also* RESTATEMENT (SECOND) OF AGENCY § 2.

INDEPENDENT CONTRACTOR WHO IS AN AGENT OF AN OWNER/CONTRACTEE

Generally, an independent contractor is not considered the agent of an owner or contractee who ordered the work performed. But if the owner or contractee's control or direction dominates the way that the work is performed, the independent contractor becomes an agent of the owner/contractee, making the owner/contractee vicariously liable for the acts of the independent contractor.

You must determine whether [***owner/contractee's name***]'s control over the work dominated the manner in which it was performed by [***independent contractor's name***]. In this regard, some factors that you may consider include:

1) the extent of control, which, by agreement, the owner/contractee may exercise over the details of the work;
2) whether the independent contractor maintains a business distinct from the owner/contractee;
3) whether the details of the work are directly supervised by the owner/contractee or performed by an independent specialist without supervision;
4) Whether the owner/contractor may hire or dismiss employees of the independent contractor;

5) whether, in the locale where the work was performed, it is customary for the owner/contractee or for the independent contractor to supply the tools, means, and place for doing the work;

6) the length of time over which the work is done;

7) whether the nature of the work is part of the regular business of the owner/contractee;

8) whether the owner/contractee and independent contractor believe they are acting as a principal and agent; that is, acting in a situation where the person in the role of an agent acts for another, known as a principal, on the principal's behalf and subject to the principal's control and consent; and

9) whether the owner/contractee is or is not in business.

These are all factors that may determine whether the manner in which the work was performed was dominated by the owner/contractee or by the independent contractor. You must examine these factors and any others that you believe to be relevant within the context that I have just supplied to you. No one factor is determinative. It is the totality of the relationship that governs. You must then determine whether [***independent contractor's name***] was an agent of [***owner/contractee's name***].

Source:

Fisher v. Townsends, Inc., Del. Supr., 695 A.2d 53 (1997)(discussing in detail agency relationships); *White v. Gulf Oil Corp.*, Del. Supr., 406 A.2d 48 (1979); *E.I. duPont de Nemours & Co. v. I.D. Griffith, Inc.*, Del. Supr., 130 A.2d 783, 784 (1957); *Seeney v. Dover Country Club Apartments, Inc.*, Del. Super., 318 A.2d 619, 621 (1974).

See also American Tel. & Tel. Co. v. Winback & Conserve Program, Inc., 3d Cir., 42 F.3d 1421, 1436-37 (1994); *Bradbury v. Phillips Petroleum Co.*, 10th Cir., 815 F.2d 1356, 1360-61 (1987); *Johnson v. Bechtel Assocs. Prof'l Corp.*, 545 F. Supp. 783, 785 (1982), *aff'd in part, rev'd in part on other grounds*, D.C. Cir., 717 F.2d 574 (1983); RESTATEMENT (SECOND) OF AGENCY § 14N (1958).

18. AGENCY

NON-DELEGABLE DUTIES OF EMPLOYER OF INDEPENDENT CONTRACTOR OR AGENT

If the work that an [__independent contractor / agent__] is hired to do involves an inherent danger to [__the public / employees of the independent contractor or agent__], and if the employer knew or had reason to know about that unusual danger, regardless of safety measures taken, then the employer of the [__independent contractor / agent__] may be subject to liability for physical harm caused by [__independent contractor / agent__]'s failure to take reasonable precautions against this danger or to give an adequate warning of the danger. Even if the employer has provided for precautions within the contract or by some other means, the employer remains subject to liability for any physical harm caused by the failure of the [__independent contractor / agent] to exercise reasonable care to avoid the harm.

{*If applicable*}: The employer will not be liable, however, for an injury caused by [__independent contractor / agent__] who has created a new risk not inherent in the work or contemplated by the employer.

For [***employer's name***] to be liable for [***plaintiff's name***] injuries, you must find that [***independent contractor / agent's name***] negligently caused [***plaintiff's name***]'s injury and that [__describe work done__] was inherently dangerous.

Source:

Fisher v. Townsends, Inc., Del. Supr., No. 308, 1996, Holland, J. (June 11, 1997)(discussing in great detail agency relationships); *Chesapeake and Potomac Tel. Co. of Maryland v. Chesapeake Util. Corp.*, Del. Supr., 436 A.2d 314, 325-27, 332 (1981)(applying Maryland law). *See also* RESTATEMENT (SECOND) OF TORTS §§ 416, 427 (1965).

18. AGENCY

CORPORATIONS AND THEIR AGENTS

[***Plaintiff / Defendant's name***] is a corporation. A corporation is considered a person within the meaning of the law. As an artificial person, a corporation can only act through its servants, agents, or employees. If you find that any of a corporation's personnel were negligent in performing their duties at the time of the incident, then the corporation is also negligent.

The fact that a party is a corporation should not affect your decision in any way. All persons, whether corporate or human, appear equally in a court of law and are entitled to the same equal consideration.

Source:
Fisher v. Townsends, Inc., Del. Supr., No. 308, 1996, Holland, J. (June 11, 1997)(discussing in great detail agency relationships); *Gutheridge v. Pen-Mod, Inc.*, Del. Super., 239 A.2d 709, 710-11 (1967).

18. AGENCY

DEFINITION OF PARTNERSHIP

{**Comment**: *Issues of partnership are generally determined as a matter of law.*}

Source:
6 *Del. C.* § 15-201; *Paciaroni v. Crane*, Del. Ch., 408 A.2d 946, (1979); *Chaiken v. Employment Sec. Comm'n*, Del. Super., 274 A.2d 707 (1971); *Garber v. Whittaker*, Del. Super., 174 A. 34 (1934); *Jones v. Purnell*, Del. Super., 62 A. 149 (1905).

18. AGENCY

SCOPE OF PARTNERSHIP BUSINESS DEFINED

Every partner is the agent of the partnership for the purpose of doing its intended business. A partner's act in furthering the partnership's business binds the entire partnership unless: (1) the partner has no authority to act, and (2) the person with whom the partner acts knows that the partner has no such authority.

In this case, you must determine whether [***partner's name***] acted within the scope of [__describe the nature of the partnership__] when [***he/she***] [__describe the actions of the partner__]. If you find that [***partner's name***] was acting outside the scope of [***his/her***] authority, then you must determine whether [***name of person with whom partner dealt***] knew that [***partner's name***] had no authority to act.

Source:

6 *Del. C.* § 15-301

18. AGENCY

JOINT VENTURE DEFINED

A joint venture is an enterprise jointly undertaken by two or more persons to carry out a single business transaction, without the designation of a partnership or corporation, for their mutual benefit. The participants share liabilities that may arise from the joint venture. Generally, there must be a contractual relationship between the participants that may be expressly stated or implied from their actions. The participants in a joint venture may variously combine their property, money, effects, skill, and knowledge. The contributions of the various participants need not be equal.

You must determine whether the association of [***person's name***] and [__list ***other alleged joint venturers***__] in [__describe the alleged enterprise__] constituted a joint venture.

Source:

See generally J. Leo Johnson, Inc. v. Carmer, Del. Supr., 156 A.2d 499, 502 (1959)(discussing general elements of joint ventures); *Hannigan v. Italo Petroleum Corp.*, Del. Supr., 77 A.2d 209, 216 (1951)(general elements of joint venture equated to those creating a syndicate); *Sheppard v. Carey*, Del. Ch., 254 A.2d 260, 262-63 (1969)(joint venture is a contractual creature); *Pan Am. Trade & Invest. Corp. v. Commercial Metals Co.*, Del. Ch., 94 A.2d 700, 702 (1953)(discussing general elements of joint ventures); *Hudson v. A.C. & S. Co.*, Del. Super., 535 A.2d 1361, 1363 (1987)(third-party claims against one joint venturer may be recovered from any of the joint venturers).

MOTOR VEHICLES

LIABILITY OF OWNER FOR PERMISSIVE USE BY A MINOR

Every motor-vehicle owner who causes or knowingly allows a minor under the age of 18 to drive the vehicle, or who furnishes the vehicle to a minor, is jointly liable with that minor for any damages caused by the minor's negligence in driving the vehicle.

If you find that [***vehicle owner's name***] surrendered control of [***his/her/its***] vehicle to [***minor's name***], then you must also find that [***vehicle owner's name***] is liable for any negligent conduct of [***minor's name***] in using [***vehicle owner's name***]'s vehicle.

Source:
21 *Del. C.* § 6106 (owner's liability for minor's negligent operation of a vehicle); *Greyhound Lines, Inc. v. Caster*, Del. Supr., 216 A.2d 689, 691 (1966); *Finkbiner v. Mullins*, Del. Super., 532 A.2d 609, 615 (1987); *Eskridge v. Ruth*, Del. Super., 105 A.2d 785, 786 (1953).

DRIVER ACTING BEYOND SCOPE OF PERMISSION TO USE VEHICLE

Ordinarily, when someone drives another's vehicle as the owner's agent with the owner's permission, the owner is liable for the driver's acts. But if the driver uses the vehicle for a private purpose, then the owner is not liable because the driver has used the vehicle outside the scope of the owner's permission. Permission means the express or implied agreement of the owner to use the vehicle. Similarly, if the driver of another's vehicle is not acting as the owner's agent but is using the vehicle with the owner's permission and for the driver's own purposes, the owner is not liable.

If you find that [***driver's name***] acted outside the scope of [***owner's name***]'s permission and used the vehicle for [***his/her***] own purposes, then you must find that [***owner's name***] is not liable for [***driver's name***]'s negligence.

{**Comment**: *See also Jury Instr. Nos. 18.5, 18.12.*}

Source:

See Wilson v. JOMA, Inc., Del. Supr., 537 A.2d 187, 189 (1988), *appeal after remand*, 561 A.2d 993 (1989); *Coates v. Murphy*, Del. Supr., 270 A.2d 527, 528 (1970); *Fields v. Synthetic Ropes, Inc.*, Del. Supr., 215 A.2d 427, 432-33 (1965)(discussing liability of owner to third party claimants); *Finkbiner v. Mullins*, Del. Super., 532 A.2d 609, 615 (1987); *Johnson v. E.I. duPont de Nemours & Co.*, Del. Super., 182 A.2d 904, 905 (1962)(setting forth dual purpose rule on whether servant is acting within scope of employment).

NO IMPUTATION OF DRIVER'S NEGLIGENCE TO PASSENGER

A driver's negligent conduct is not imputed to a passenger, unless the passenger exercises some control over the driver's operation of the vehicle.

If you find that [***passenger's name***] did not exercise some control over [***driver's name***]'s operation of the vehicle, then [***passenger's name***] is not liable for [***driver's name***] negligence.

Source:
Hickman v. Parag, Del. Supr., 167 A.2d 225, 229 (1961); *Roach v. Parker*, Del. Super., 107 A.2d 798, 799-800 (1954); *Fusco v. Dauphin*, Del. Super., 88 A.2d 813, 815 (1952).

18. AGENCY

PARENTAL LIABILITY FOR MINOR'S NEGLIGENT USE OF VEHICLE

Under Delaware law, a parent or guardian who signs a minor's application for a driver's license is liable, along with the minor, for damages caused by the minor's negligent operation of a vehicle on a highway.

If you find that [***name of parent(s)***] signed [***name of minor***]'s application for [***his/her***] driver's license, then [***name of parent(s)***] [***is/are***] liable for any damages that you may award to [***plaintiff's name***].

Source:

21 *Del. C.* § 6105 (outlining liability of parents for minor's negligent operation of motor vehicle); *Alfieri v. Martelli*, Del. Supr., 647 A.2d 52, 54-55 (1994); *Williams v. Williams*, Del. Supr., 369 A.2d 669, 670-73 (1976); *McGeehan v. Schiavello*, Del. Supr., 265 A.2d 24, 25-26 (1970); *Markland v. Baltimore & O. R. Co.*, Del. Super., 351 A.2d 89, 92-93 (1976); *Rovin v. Connelly*, Del. Super., 291 A.2d 291, 292-93 (1972). *See also Tatlock v. Nathanson*, D. Del., 169 F. Supp. 151 (1959)(finding parental liability for negligent operation of vehicle by minor under parents control).

NEGLIGENT ENTRUSTMENT OF A VEHICLE

If a vehicle owner entrusts the vehicle to a driver who is so reckless or incompetent that using the vehicle becomes dangerous -- and the owner knows or has reason to know at the time the vehicle is entrusted that the driver is reckless or incompetent -- then the owner is liable for damages arising from the driver's negligence.

You must determine whether at the time that [***vehicle owner's name***] entrusted the vehicle to [***driver's name***], [***vehicle owner's name***] knew or should have known that [***driver's name***] was incompetent to drive the vehicle safely.

Source:

Smith v. Callahan, Del. Supr., 144 A. 46, 50-51 (1928)(adopting negligent entrustment doctrine and rejecting "family use" doctrine); *Finkbiner v. Mullins*, Del. Super., 532 A.2d 609, 615-16 (1987)(negligent entrustment of an automobile); *Markland v. Baltimore & O. R. Co.*, Del. Super., 351 A.2d 89, 92-93 (1976)(minor's negligent use of vehicle owned by employer); *Horkey v. Cortz*, Del. Super., 173 A.2d 741 (1961)(negligence liability of bailee of automobile not imputable to bailor).

19. CONTRACTS

CONTRACT FORMATION

A contract is a legally binding agreement between two or more parties. Each party to the contract must perform according to the agreement's terms. A party's failure to perform a contractual duty constitutes breach of contract. If a party breaches the contract and that breach causes injury or loss to another party, then the injured party may claim damages.

For a legally binding contract to exist, there must be:

1) an offer of a contract by one party;

2) an acceptance of that offer by the other party;

3) consideration for the offer and acceptance; and

4) sufficiently specific terms that determine the obligations of each party.

In this case, [***plaintiff's name***] alleges that [***defendant's name***] breached a contract by [__describe alleged breach__]. You must determine from a preponderance of the evidence whether a legally binding contract was formed between [***plaintiff's name***] and [***defendant's name***].

Source:

Generally: *Leeds v. First Allied Connecticut Corp.*, Del. Ch., 521 A.2d 1095, 1101-02 (1986); *Norse Petroleum A/S v. LVO International, Inc.*, Del. Super., 389 A.2d 771, 773 (1978).

Offer and Acceptance: *Industrial America, Inc. v. Fulton Indus., Inc.*, Del. Supr., 285 A.2d 412, 415 (1971)(manifestation of intent must be overt, not subjective); *Friel v. Jones*, Del. Ch., 206 A.2d 232, 233-34 (1964), *aff'd*, Del. Supr., 212 A.2d 609 (1965)(acceptance must be identical with offer and be unconditional); *Salisbury v. Credit Service*, Del. Super., 199 A. 674, 681-82 (1937)(advertisements, prospecti, circulars are not generally offers).

Definiteness: *Marta v. Nepa*, Del. Supr., 385 A.2d 727, 729 (1978); *Hindes v. Wilmington Poetry Soc.*, Del. Ch., 138 A.2d 501, 503 (1958); *Guyer v. Haveg Corp.*, Del. Super., 205 A.2d 176, 182 (1964), *aff'd*, Del. Supr., 211 A.2d 910 (1965).

19. CONTRACTS

MEETING OF THE MINDS

A legally binding contract requires that the parties manifest or show mutual assent to the contract's terms. Mutual assent is not a subjective or personal understanding of the terms by either party. Rather, mutual assent must be shown by words or acts of the parties in a way that represents a mutually understood intent.

Source:

George & Lynch Co. v. State, Del. Supr., 197 A.2d 734, 736 (1964); *Limestone Realty Co. v. Town & Country Fine Furniture and Carpeting, Inc.*, Del. Ch., 256 A.2d 676, 679 (1969)(contract cannot arise from offer that offeree knows is unintended); *Barnard v. State*, Del. Super., 642 A.2d 808, *aff'd*, Del. Supr., 637 A.2d 829 (1992).

19. CONTRACTS

OFFER

An offer is a display of willingness to enter into a contract on specified terms. To constitute an offer, this display must be made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.

Source:
Gilbert v. El Paso Co., Del. Supr., 575 A.2d 1131, 1142 (1990); *Salisbury v. Credit Service*, Del. Super., 199 A. 674, 681-82 (1938)(discussing elements of valid offer and acceptance). *See also* BLACK'S LAW DICTIONARY 453 (Garner, ed. 1996)(pocket ed.).

19. CONTRACTS

DURATION OF OFFER

An offer [__or counteroffer__] remains open for a reasonable time only, unless withdrawn earlier. What constitutes a reasonable period must be determined from the particular circumstances of the case and from any conditions declared in the terms of the offer.

Source:

See, e.g., Wroten v. Mobil Oil Corp., Del. Supr., 315 A.2d 728, 730-31 (1973)(revocation of gratuitous option); *Chrysler Corp. v. Quimby*, Del. Supr., 144 A.2d 123, 129 (1958)(withdrawal of offer); *Murray v. Lititz*, Del. Super., 61 A.2d 409, 410 (1948)(counteroffers). *See also* 6 *Del. C.* § 2-205 (Under UCC firm offers may be held open for reasonable period up to 90 days; no consideration is required).

19. CONTRACTS

ACCEPTANCE

An acceptance of an offer is an agreement, either by express act or by conduct, to the precise terms of the offer so that a binding contract is formed. If the acceptance modifies the terms or adds new ones, it generally operates as a counteroffer and a binding contract is not yet formed.

Source:

Industrial America, Inc. v. Fulton Indus., Inc., Del. Supr., 285 A.2d 412, 415-16 (1971)(manifestation of intent must be overt, not subjective); *Schenley Indus., Inc. v. Curtis*, Del. Supr., 152 A.2d 300 (1959)(where offer indicates medium of reply, the acceptance must be made accordingly); *Limestone Realty Co. v. Town & Country Fine Furniture and Carpeting, Inc.*, Del. Ch., 256 A.2d 676, 679 (1969)(gratuitous offer will not ripen into contract if offeree knew or should have known offer was not serious on its face); *Friel v. Jones*, Del. Ch., 206 A.2d 232, 233-34 (1964), *aff'd*, Del. Supr., 212 A.2d 609 (1965)(acceptance must be identical with offer and be unconditional).

19. CONTRACTS

COUNTEROFFER

When a party receives an offer but replies with a new offer that varies the terms of the original offer, the original offer is rejected and the new offer is called a counteroffer. A counteroffer may be accepted or rejected like any other offer.

Source:
Murray v. Lititz, Del. Super., 61 A.2d 409, 410 (1948)(duration of counteroffers limited to reasonable time only); *Friel v. Jones*, Del. Ch., 206 A.2d 232, 233-34 (1964), *aff'd*, Del. Supr., 212 A.2d 609 (1965)(acceptance must be identical with offer and be unconditional).

19. CONTRACTS

CONSIDERATION

Consideration is something of value received by someone which induces them to make a promise to the person giving the thing of value. To be enforceable, a contract must be supported by consideration. Consideration may include money, an act, a promise not to act, or a return promise, and it may be found anywhere in the transaction, whether or not it is [clearly stated/ spelled out in writing] as "consideration."

Source:*Ryan v. Weiner*, Del. Ch., 610 A.2d 1377, 1380-82 (1992); *Equitable Trust Co. v. Gallagher*, Del. Supr., 99 A.2d 490, 492-93 (1953); *Glenn v. Tidewater Associated Oil Co.*, Del. Ch., 101 A.2d 339, 344 (1954)(adequacy of consideration not generally a concern of the court); *Abbott v. Stephany Poultry Co.*, Del. Super., 62 A.2d 243, 246 (1948); *Affiliated Enterprises v. Waller*, Del. Super., 5 A.2d 257, 259 (1939); *American University v. Todd*, Del. Super., 1 A.2d 339, 595 (1938).

19. CONTRACTS

MUTUAL MISTAKE

If the parties to a contract are both mistaken about an important fact, and if the mistake involves a basic assumption of the agreement and not merely an incidental matter, then the contract may be voided. An important fact is one that, in light of the surrounding circumstances, would affect the decision-making of the parties. The party complaining of the mistake must demonstrate a reasonable degree of diligence in discovering the necessary facts before the agreement was made. Finally, the mistake itself must be shown by clear and convincing evidence.

You may find that the contract at issue is not enforceable only if you find:

(1) that [***plaintiff's name***] has shown by clear and convincing evidence that there was a mistake of fact about [__describe the alleged mistake of fact__];

(2) that the mistake of fact was important to the agreement between [***plaintiff's name***] and [***defendant's name***]; and

(3) that [***plaintiff's name***] made a reasonable effort to discover the correct facts before entering the contract.

Source:

Craft Builders, Inc. v. Ellis D. Taylor, Inc., Del. Supr., 254 A.2d 233, 235 (1969)(mistake must be shown by clear and convincing evidence); *McGuirk v. Ross*, Del. Supr., 166 A.2d 429, 430 (1960); *Matter of Enstar Corp.*, Del. Ch., 593 A.2d 543, 551-52 (1991)(general discussion of elements of mutual mistake); *Hendrick v. Lynn*, Del. Ch., 144 A.2d 147, 150 (1958); *Demetiades v. Kledarns*, Del. Ch., 121 A.2d 293, 295-96 (1956)(formal writing stands unless through mutual mistake, or the mistake of another party with a contracting party, the agreement fails to express the contract actually made).

19. CONTRACTS

INTOXICATION - MENTAL INCAPACITY

If a party is intoxicated by alcohol or drugs when a contract is formed, that party may void the contract if his or her mental capacity was so impaired that he or she was unable to understand and act rationally in the particular transaction. Merely being under the influence of intoxicating alcohol or drugs isn't enough reason to void a contract. Similarly, ignorance about the nature of the contract isn't enough. To void the contract, the intoxicated party must be so mentally impaired as to be incapable of understanding the subject and nature of the contract's terms at the time the agreement was made.

You must determine in light of the evidence whether [***plaintiff's name***] was mentally incapable of comprehending the contract to [__briefly describe terms of contract__] with [***defendant's name***] when the contract was formed.

Source:

Poole v. Hudson, Del. Super., 83 A.2d 703, 704 (1951)(mental incapacity due to use of prescription medicine may justify avoidance of contract, but intoxication or use of illegal drug use does not in itself result in incapacity); *Poole v. Newark Trust Co.*, Del. Super., 8 A.2d 10, 15-16 (1939)(insane persons); *Warwick v. Addicks*, Del. Super., 157 A. 205, 207 (1931)(before capacity to contract is destroyed by unsoundness of mind, reasoning powers must be so impaired as to be incapable of comprehending and acting rationally in the transaction).

19. CONTRACTS

DURESS - UNDUE INFLUENCE

A person whose agreement to a contract was brought about by [__duress / undue influence__] that denied the person's free choice is not bound by that agreement. [__Duress / undue influence__] has four elements:

1) a person subject to [__duress / undue influence__];

2) an opportunity to exercise [__duress / undue influence__];

3) a disposition of the alleged oppressor to exert this influence; and

4) a result indicating the presence of [__duress / undue influence__].

Ordinary persuasion or argument does not amount to [__duress / undue influence__].

If you find that [***defendant's name***] exercised force or undue influence that denied [***plaintiff's name***] a free choice in making [***his/her***] decision, then you may find that the contract was made under [__duress / undue influence__] and is void.

Source:

See Ryan v. Weiner, Del. Ch., 610 A.2d 1377, 1380 (1992); *Robert O. v. Ecmel A.*, Del. Supr., 460 A.2d 1321, 1323 (1983)(general discussion of elements of claim of undue influence); *Fowler v. Mumford*, Del. Super., 102 A.2d 535, 538 (1954)(acts constituting duress must be wrongful, unless excepted by statutory rule); *Fluharty v. Fluharty*, Del. Super., 193 A. 838, 840 (1937)(acts which are not actually violent or threaten violence, may still constitute coercion if they override the other party's judgment and will). *See also* 31 *Del. C.* § 3913 (exploitation of an infirm adult).

19. CONTRACTS

UNDUE INFLUENCE - CONFIDENTIAL RELATIONSHIP

If the parties to a transaction stand in a confidential relationship with each other, there is a presumption that the transaction is not valid if the person in the superior position obtains a benefit at the expense of the person in the inferior position when the person in the inferior position has not had the benefit of competent independent advice in the matter. The person in the superior position has a duty to advise the other to seek independent advice and, when this advice is indispensable, to see that the advice was obtained before proceeding with the transaction. Confidential relationships are those, for example, between an attorney and a client; a doctor and a patient; a stockbroker and a customer. Competent independent advice means the advice of an attorney or other professional who is able to provide unbiased and complete information about the transaction and who has no personal interest in it.

In this case, a confidential relationship of [__describe relationship__] existed between [***plaintiff's name***] and [***defendant's name***]. You must decide whether [***defendant's name***] benefitted at the expense of [***plaintiff's name***] from [__describe transaction__] arising out of this relationship, and whether [***plaintiff's name***] received competent independent advice before entering into the agreement with [***defendant's name***].

Source:

Robert O. v. Ecmel A., Del. Supr., 460 A.2d 1321, 1323 (1983); *Peyton v. William C. Peyton Corp.*, Del. Supr., 7 A.2d 737, 746-47 (1939)(reviewing the general duties in a confidential relationship); *Swain v. Moore*, Del. Ch., 71 A.2d 264, 267-68 (1950).

MINORS

Persons must be 18 years old before they can enter into contracts that are legally binding. But an exception to this rule exists for minors who must enter into contracts to obtain things indispensable to living, such as food, shelter, and clothing. In law, these things are known as "necessaries."

You must determine whether the contract between [***minor's name***] and [***other party's name***] was made for the purpose of securing necessaries.

Source:
Bloxam v. Lank, Del. Comm. Pl., 2 Del. Cas. 226 (1796)(infants generally not bound except for necessaries).

FRAUD OR MISREPRESENTATION BY A PARTY INVALIDATES CONTRACT

If there is a misrepresentation when a contract is being formed, the contract is void. So, if you find that [***defendant's name***] was involved in acts of intentional or negligent misrepresentation when the contract was formed, then you must find that there has been a breach of contract entitling [***plaintiff's name***] to an award of contractual damages.

If, on the other hand, you find that [***defendant's name***] was involved in acts of misrepresentation when the contract was formed, but that those misrepresentations were not done purposely or negligently, but rather unintentionally, then the contract is void only if you find:

(1) that there was in fact an unintentional misrepresentation;

(2) that the misrepresentation was important to the contract's essential purpose;

(3) that the misrepresentation induced [***plaintiff's name***] to enter into the contract; and

(4) that [***plaintiff's name***] acted reasonably in entering into the contract given the misrepresentation made.

Source:

Kern v. NCD Indus., Inc., Del. Ch., 316 A.2d 576, 582 (1973); *Stevens v. Johnston*, Del. Ch., 117 A.2d 540, 542 (1955); *Hegarty v. American Commonwealth Power Corp.*, Del. Ch., 163 A. 616, 618-19 (1932); *Travers v. Artic Roofing*, Del. Super., 27 A.2d 78, 80 (1942), *aff'd*, Del. Supr., 32 A.2d 559; *but see Eastern States Petroleum Co. v. Universal Oil Products Co.*, Del. Ch., 49 A.2d 612, 616 (1946)(defrauded complainant cannot accept benefits of transaction and shirk its disadvantages).

19. CONTRACTS

PROMISSORY ESTOPPEL

If someone makes a promise to a person who reasonably relies on that promise and who later takes an action to that person's detriment, then the one making the promise is obligated to fulfill the promise. A promise is a declaration by which a person agrees to perform or refrain from doing a specified act. Mere expressions of opinion, expectation, or assumption are not promises.

You must determine from the evidence whether [***defendant's name***] made a promise to [***plaintiff's name***] to [__describe alleged promise__]. If you find that such a promise was made and that [***plaintiff's name***] relied on it to [***his/her/its***] detriment, then you may award [***plaintiff's name***] damages for the detriment suffered as a result of [***defendant's name***]'s failure to fulfill [***his/her/its***] promise.

Source:

Haveg Corp. v. Guyer, Del. Supr., 226 A.2d 231, 236-37 (1967); *Hessler, Inc. v. Farrell*, Del. Supr., 226 A.2d 708, 711 (1967); *Metropolitan Convoy v. Chrysler Corp.*, Del. Supr., 208 A.2d 519, 521 (1965); *Danby v. Osteopathic Hosp. Ass'n of Delaware*, Del. Supr., 104 A.2d 903, 907 (1954)(promise to a charity); *Borish v. Graham*, Del. Super., 655 A.2d 831, 835-36 (1994). *See also Reeder v. Sanford School, Inc.*, Del. Super., 397 A.2d 139, 141 (1979)(indicating that claim in estoppel requires proof by clear and convincing evidence).

CONSTRUCTION OF AMBIGUOUS TERMS - BREACH OF CONTRACT

{**Comment**: *Construction of terms and the existence of any ambiguities in a contract are generally questions of law for the court to decide. On the other hand, questions of whether a contract exists or whether a party fulfilled the contract's requirements are issues of fact for a jury to decide. The following discussion reviews the basics of construction as applied to contracts.*}

[There are certain rules to consider in interpreting contractual terms that appear ambiguous or unclear.

First, if the party that drafted the language of the contract can be determined, the language must be construed most strongly against that party.

Second, if the contract's language is susceptible of two constructions, one of which makes it a fair, customary, and reasonable contract that a prudent person would make, while the second interpretation makes the contract inequitable, unusual, or one that a prudent person would likely not make, the first interpretation must be preferred.

Third, to determine the parties' intent when there are ambiguous terms, the jury will look to the construction given to the terms by the parties as shown through their conduct during the period after the contract allegedly became effective and before the institution of this lawsuit. The parties' conduct after a contract is made should be given great weight in determining its meaning.

Finally, explanatory circumstances existing when the contract was allegedly made may

be considered in order to determine the parties' probable intent.]

Source:

Rhone-Poulenc v. American Motorists Ins. Co., Del. Supr., 616 A.2d 1192, 1195 (1992)(discussing rules of construction); *Graham v. State Farm Mut. Auto Ins. Co.*, Del. Supr., 565 A.2d 908, 912 (1989)(same); *Artesian Water Co. v. State Dep't of Highways & Trans.*, Del. Supr., 330 A.2d 441, 443 (1974)(same); *State v. Dabson*, Del. Supr., 217 A.2d 497, 500 (1966); *B.S.F. Co. v. Philadelphia Nat. Bank Co.*, Del. Supr., 204 A.2d 746, 750 (1964); *Holland v. National Automotive Fibers*, Del. Ch., 194 A. 124, 127 (1937); *Goodman v. Continental Cas. Co.*, Del. Super., 347 A.2d 662, 665 (1975); *Hudson v. D&V Mason Contractors, Inc.*, Del. Super., 252 A.2d 166, 168-69 (1969); *Hajoca Corp. v. Security Trust Co.*, Del. Super., 25 A.2d 378, 381, 383 (1942); *Pope v. Landy*, Del. Super., 1 A.2d 589, 594 (1938).

Rhone-Poulenc, 616 A.2d at 1195 (correct construction of any contract, including insurance policy, is a question of law); *Aetna Cas. and Sur. Co. v. Kenner*, Del. Supr., 570 A.2d 1172, 1174 (1990)(same); *Rohner v. Niemen*, Del. Supr., 380 A.2d 549, 552 (1977)(construction of a deed is a question of law).

19. CONTRACTS

CONTRACT MODIFICATION

Generally, a written contract may be modified by a later oral agreement. An oral agreement that modifies a written contract must be specific, direct, and clear about the parties' intention to change their original agreement. [__If the contract concerns services, the modification may also require additional consideration if a basic term of the contract is affected.__]

Source:

Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc., Del. Supr., 297 A.2d 28, 33 (1972); *Reeder v. Sanford School, Inc.*, Del. Super., 397 A.2d 139, 141 (1979); *De Cecchis v. Evers*, Del. Super., 174 A.2d 463, 464 (1961).

19. CONTRACTS

PERFORMANCE

Performance is the successful completion of a contractual duty and usually results in the performer's release from any past or future liability on the contract. Successful completion of contractual duties simply requires that the terms be satisfied.

Source:
See, e.g., Ridley Inv. Co. v. Croll, Del. Supr., 192 A.2d 925, 926-27 (1963); *Hudson v. D&V Mason Contractors, Inc.*, Del. Super., 252 A.2d 166, 169-70 (1969); *Emmett S. Hickman Co. v. Emelio Capaldi Developer, Inc.*, Del. Super., 251 A.2d 571, 572-73 (1969).

19. CONTRACTS

SUBSTANTIAL PERFORMANCE

A good-faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement is considered complete if the substantial purpose of the contract is accomplished. This means that the contract has been completed in every significant respect. [For example, if a builder completes an office tower but fails to apply a second coat of paint to the basement walls, the builder will have substantially performed the contract. This situation is known in the law as substantial performance. In our example, the builder would be entitled to payment on the terms of the contract but would also be liable to the office tower's owner for the cost of painting the basement walls.]

If you find that [***performer's name***] substantially performed the duties of the contract with [***other party's name***] to [__describe duties briefly__], then [***performer's name***] is entitled to [__receive / recover__] [__describe amount owed, action due, etc.__] from [***other party's name***] and you may award damages accordingly. If you also find that [***other party's name***] suffered minimal damages due to the slight deviation by [***performer's name***] in substantially performing the contract, you may award [***other party's name***] damages in the amount necessary to finish the contract.

Source:

Emmett S. Hickman Co. v. Emelio Capaldi Developer, Inc., Del. Super., 251 A.2d 571, 572-73 (1969).

19. CONTRACTS

PERFORMANCE PREVENTED BY A PARTY TO THE CONTRACT

A party to a contract may not prevent another party from performing its contractual duties and then claim that the other party has breached the contract or failed to complete its terms. [For example, a farmer who contracts with a builder to put up a barn on the farmer's land must make the land available to the builder so that the work may be done. Likewise, the farmer must not interfere with the progress of the work.]

In this case, you must determine whether [***party allegedly preventing performance***] prevented or otherwise interfered with [***other party's name***]'s duty to perform [__describe terms of the contract__].

Source:

J.A. Jones Contr. Co. v. City of Dover, Del. Super., 372 A.2d 540, 546-47 (1977); *T.B. Cartmell Paint & Glass Co. v. Cartmell*, Del. Super., 186 A. 897, 903 (1936). *See also Shearin v. E.F. Hutton Group, Inc.*, Del. Ch., 652 A.2d 578, 590 (1994)(a party to a contract cannot be liable both for breach of a contract and for inducing that breach).

19. CONTRACTS

RECOVERY FOR BREACH OF CONTRACT

Because [***plaintiff's name***] was a party to the contract at issue, [***plaintiff's name***] would be entitled to recover damages from [***defendant's name***] for any breach of the contract. To establish that [***defendant's name***] is liable to [***plaintiff's name***] for breach of contract, [***plaintiff's name***] must prove that one or more terms of [***plaintiff's name***]'s contract with [***defendant's name***] have not been performed and that [***plaintiff's name***] has sustained damages as a result of [***defendant's name***]'s failure to perform.

Source:
Ridley Inv. Co. v. Croll, Del. Supr., 192 A.2d 925, 926-27 (1963); *Hudson v. D&V Mason Contractors, Inc.*, Del. Super., 252 A.2d 166, 169-70 (1969); *Emmett S. Hickman Co. v. Emelio Capaldi Developer, Inc.*, Del. Super., 251 A.2d 571, 572-73 (1969).

19. CONTRACTS

THIRD PARTY BENEFICIARIES

[***Plaintiff's name***] contends that he is a third-party beneficiary of the contract between [***defendant's name***] and [***other party's name***].

A third-party beneficiary is a [__person, corporation, etc.__] who is entitled to certain benefits from a contract even though that [__person, corporation, etc.__] did not sign that contract. The rights of a third party claiming beneficiary status must be measured by the terms of the agreement between the contracting parties. Generally, the rights of a third-party beneficiary are spelled out in the contract and can be asserted only against the party that has obligated itself.

Here, [***plaintiff's name***] claims that [__state contentions__]. You must determine whether [***defendant's name***] was obligated to [***plaintiff's name***] [__or whether that obligation remained with (***other party's name***), an entity that is not a party to this action.]

Source:

Triple C Railcar Service, Inc. v. City of Wilmington, Del. Supr., 630 A.2d 629, 633 (1993); *Rumsey Elec. Co. v. University of Delaware*, Del. Supr., 358 A.2d 712, 714 (1976); *Farmers Bank of State of Delaware v. Howard*, Del. Ch., 276 A.2d 744, 745-46 (1971); *Guardian Contr. Co. v. Tetra Tech Richardson, Inc.*, Del. Super., 583 A.2d 1378, 1386-87 (1990).

19. CONTRACTS

ASSIGNMENTS

An assignment is any transfer of rights under a contract. Generally, an assignment of contractual rights is valid unless the contract involves personal services, is contrary to public policy, or is expressly prohibited in the contract.

Source:
Industrial Trust Co. v. Stidham, Del. Supr., 33 A.2d 159, 160-61 (1942)(judgments arising from contract not involving personal services are assignable); *FinanceAmerica Private Brands, Inc. v. Harvey E. Hall, Inc.*, Del. Super., 380 A.2d 1377, 1380 (1977); *Paul v. Chromalytics Corp.*, Del. Super., 343 A.2d 622, 625-26 (1975).

19. CONTRACTS

WAIVER

Waiver is the voluntary relinquishment or abandonment of a legal right or advantage. A waiver may be expressly made or implied from conduct or other evidence. The party alleged to have waived a right must have known about the right and intended to give it up.

In this case, you must determine whether [***defendant's name***] waived [***his/her/its***] contractual right[***s***] to [__describe particular rights__].

Source:

Moore v. Travellers Indem. Ins. Co., Del. Supr., 408 A.2d 298, 301 (1979); *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, Del. Supr., 297 A.2d 28, 33 (1972); *Klein v. American Luggage Works, Inc.*, Del. Supr., 158 A.2d 814 (1960); *Reeder v. Sanford School, Inc.*, Del. Super., 397 A.2d 139, 141 (1979)(claims in waiver and estoppel must be shown by clear and convincing evidence).

19. CONTRACTS

ESTOPPEL

When the conduct of a party to a contract intentionally or unintentionally leads another party to the contract, in reasonable reliance on that conduct, to change its position to its detriment, then the original party cannot enforce a contractual right contrary to the second party's changed position. This is known in the law as estoppel. Reasonable reliance means that the party that changed its position must have lacked the means of knowing the truth about the facts in question.

In this case, [***plaintiff's name***] must prove:

1) that there was a contractual relationship between [***plaintiff's name***] and [***defendant's name***];

2) that [***plaintiff's name***] changed [***his/her/its***] position to [***his/her/its***] detriment because of [***defendant's name***]'s conduct; and

3) that [***plaintiff's name***] reasonably relied on the conduct of [***defendant's name***].

You must determine whether [***plaintiff's name***] has proved all of the above elements by clear and convincing evidence.

Source:
Waggoner v. Laster, Del. Supr., 581 A.2d 1127, 1136 (1990); *Wilson v. American Ins. Co.*, Del. Supr., 209 A.2d 902, 903-04 (1965); *Reeder v. Sanford Sch., Inc.*, Del. Super., 397 A.2d 139, 141-42 (1979); *National Fire Ins. Co. v. Eastern Shore Laboratories, Inc.*, Del. Super., 301 A.2d 526, 529 (1973).

19. CONTRACTS

EMPLOYMENT CONTRACTS

Generally, a contract for employment is at will. Employment at will means that either party may terminate the contract at any time without providing a reason or cause.

In light of the evidence presented, you must determine whether [***plaintiff's name***]'s employment agreement with [***defendant's name***] expressly created a definite period of employment or otherwise expressly created a contract that could not be terminated at will.

Source:

E.I. duPont de Nemours & Co. v. Pressman, Del. Supr., 679 A.2d 436, 441, 444 (1996)(covenant of good faith and with fair dealing applies to at-will employment contract); *Merrill v. Crothall-American, Inc.*, Del. Supr., 606 A.2d 96, 101-03 (1992)(implied covenant of good faith and fair dealing inheres to all employment contracts); *Heideck v. Kent General Hosp., Inc.*, 446 A.2d 1095, 1096-97 (1982)(discussing nature of at-will employment); *White v. Gulf Oil Co.*, Del. Supr., 406 A.2d 48, 52 (1979); *Lester C. Newton Trucking Co. v. Neal*, Del. Supr., 204 A.2d 393, 394-95 (1964)(reviewing elements that determine existence of master-servant relationship); *Barnard v. State*, Del. Super., 642 A.2d 808, 815, *aff'd*, Del. Supr., 637 A.2d 829 (1992)(existence of employer-employee relationship is a matter of law); *Haney v. Laub*, Del. Super., 312 A.2d 330, 332 (1973)(hiring for an indefinite period, which is ordinarily terminable at will, may be modified by a subsequent contractual restriction upon the right to discharge).

COVENANT OF GOOD FAITH

APPLIES TO DISCHARGE OF AT-WILL EMPLOYEE

Under Delaware law, an at-will employment contract may be terminated at any time by either party without cause and regardless of motive. But this right to terminate is subject to a duty to act in good faith and with fair dealing. This duty is violated when an employee is discharged as a result of ill will, with an intent to cause harm, and by means of deceit, fraud, or misrepresentation.

To prove that [***defendant's name***] did not act in good faith or with fair dealing, [***plaintiff's name***] must show by a preponderance of the evidence that:

(1) [***defendant's name***] harbored ill will toward [***plaintiff's name***];

(2) [***defendant's name***] intended to cause harm to [***plaintiff's name***] and committed [__describe acts of deceit, fraud or misrepresentation__]; and

(3) [***defendant's name***] acted to [__describe deceit, fraud or misrepresentation--] and caused [***plaintiff's name***] to be discharged from [***his/her***] employment.

If [***plaintiff's name***] has not proved the above matters, then you must find for [***defendant's name***].

Source:

Pressman v. E.I. duPont de Nemours & Co., Del. Supr., 679 A.2d 436, 441, 444 (1996); *Tuttle v. Mellon Bank of Delaware*, Del. Super., 659 A.2d 786, 789 (1995)(willful or wanton conduct of employee constitutes grounds for immediate dismissal without notice if sufficiently serious); *Merrill v. Crothall-American, Inc.*, Del. Supr., 606 A.2d 96, 102 (1992)(at-will employment contract terminable by either party); *Conner v. Phoenix Steel Corp.*, Del. Supr., 249 A.2d 866,

868-69 (1969)(defining "discharge" and "layoff"); *Shearin v. E.F. Hutton Group, Inc.*, Del. Ch., 652 A.2d 578, 586-89 (1994)(finding wrongful discharge of at-will employee terminated for actions required under rules of professional conduct); *Haney v. Laub*, Del. Super., 312 A.2d 330, 332 (1973)(at-will employees may be terminated by either party, with or without cause); *Ortiz v. Unemployment Ins. Appeal Bd.*, Del. Super., 305 A.2d 629, 631 (1973)(prior warning about employee's misconduct not prerequisite to dismissal for cause); *Barisa v. Charitable Research Fnd.*, Del. Super., 287 A.2d 679, 681-82 (1972)(discussing grounds for dismissal for cause).

19. CONTRACTS

QUANTUM MERUIT

Quantum meruit is a legal term that comes from a Latin phrase meaning "as much as he has deserved." A person who has supplied services to another is entitled to recover under a claim in *quantum meruit* for the value of those services even when there is no formal agreement between the two parties. On the other hand, someone who volunteers services or imposes those services on another is not entitled to compensation.

To recover in *quantum meruit*, [***plaintiff's name***] must show by a preponderance of the evidence each of the following elements:

(1) that [***his/her***] services were performed with a reasonable expectation that [***defendant's name***] would pay for them;

(2) that [***defendant's name***] had notice that [***plaintiff's name***] expected to be paid for [***his/her***] services; and

(3) that [***plaintiff's name***]'s services were of value to [***defendant's name***].

Source:
Construction Systems Group, Inc. v. Council of Sea Colony (Phase I), Del. Supr., No. 449, 1994, Veasey, C.J. (Sept. 28, 1995)(Order); *Marta v. Nepa*, Del. Supr., 385 A.2d 727, 730 (1978); *Bellanca Corp. v. Bellanca*, Del. Supr., 169 A.2d 620, 623 (1961); *Haight & Assoc. v. Venables & Sons, Inc.*, Del. Super., C.A. No. 94C-11-023, Lee, J. (Oct. 30, 1996); *Cheeseman v. Grover*, Del. Super., 490 A.2d 175, 177 (1984). *See also United States v. Western States Mech. Constr., Inc.*, 10th Cir., 834 F.2d 1533, 1539 (1987).

19. CONTRACTS

BROKERAGE CONTRACTS

{**Comment**: *Many brokerage relationships -- for example, in real estate or securities – are heavily regulated. See the appropriate provisions, if any, in the Code or in the relevant agency's regulations for the necessary language for a jury instruction. If a brokerage relationship is not regulated by statutory provision, then the common law of contract and agency apply.*}

Source:

See generally Eastern Commercial Realty Corp. v. Fusco, Del. Supr., 654 A.2d 833, 835-36 (1995); *Slaughter v. Stafford*, Del. Supr., 141 A.2d 141, 143-45 (1958); *Bernhardt v. Luke*, Del. Supr., 126 A.2d 556, 558 (1956); *Canadian Indus. Alcohol Co. v. Nelson*, Del. Supr., 188 A. 39, 51-52 (1936); *New York Stock Exchange v. Pickard & Co.*, Del. Ch., 274 A.2d 148, 150 (1971); *Dougherty v. Dunham*, Del. Super., 249 A.2d 748, 748-49 (1969).

19. CONTRACTS

DUTY OF A BROKER

A broker has a duty to serve the client with good faith and loyalty in all matters falling within their relationship. The broker is bound to use reasonable diligence in carrying out the duties required or reasonably expected by the client. Reasonable diligence means the skill and judgment that brokers with similar responsibilities would be expected to apply under similar circumstances. Good faith and loyalty mean that the broker will act honestly and without self-interest to further the best interests of the principal.

Source:
Goodrich v. E.F. Hutton Group, Inc., Del. Ch., 542 A.2d 1200, 1204 (1988)(stock brokers); *Warwick v. Addicks*, Del. Super., 157 A. 205, 206-07 (1931)(duty of good faith and loyalty of broker to principal); *In re Ellis Estate*, Del. Orph., 6 A.2d 602, 612 (1939)(broker's relationship to customer is that of agent, bailee or trustee).

19. CONTRACTS

PROCURING CAUSE

Procuring cause refers to the efforts of an agent or broker who brings about the sale of real estate and is therefore entitled to a commission. If there are two or more brokers who have non-exclusive listings for a particular property, the broker whose efforts predominate in bringing about the sale is entitled to the commission.

You must determine by a preponderance of the evidence whether [***broker A's name***] or [***broker B's name***] [__and any other brokers__] made the predominant effort that brought about the sale of [__describe real estate__] to [***purchaser's name***].

Source:

Slaughter v. Stafford, Del. Supr., 141 A.2d 141, 145-46 (1958).

20. CONDEMNATION

INTRODUCTION -- STATUTORY AUTHORITY

[***Condemning authority's name***], under the power of eminent domain found in [__cite statutory authority__], is taking an undivided [__identify type__] interest in certain property owned by [***landowner's name***]. The property is [__identify location of property__], [_____] County, State of Delaware, and the property being taken has no liens, encumbrances, charges, or claims against it.

The taking of the property has been accomplished in accordance with the requirements of the law. The sole question before you is the issue of just compensation to be paid by [***condemning authority's name***] to the owners of the property.

Source:

See 10 *Del. C.* ch. 61; 29 *Del. C.* § 8406; 17 *Del. C.* §§ 132, 137.

20. CONDEMNATION

DEFINITION OF COMPENSATION

The Delaware Constitution provides that no property may be taken or applied to public use without just compensation. You must determine the amount of compensation that is just and fair both to the owner of the property and to the public represented by the condemning authority. Your decision must be based wholly on the evidence presented before you in these proceedings, considered in light of the view of the property and in light of the legal principles stated in these instructions.

Source:

DEL. CONST. art. 1, § 8 (state power of eminent domain); 10 *Del. C.* § 6108(e) (requiring "just compensation" for property taken by State authority under the doctrine of eminent domain); *State* ex rel. *Secretary of Dep't of Hwys. & Transp. v. Davis Concrete of Delaware*, Del. Supr., 355 A.2d 883, 886 (1976); *State* ex. rel. *Smith v. 16.50, 10.04629, 3.34, 1.84, 5.97741, 3.94 and 7.49319 Acres of Land*, Del. Super., 200 A.2d 241, 244 (1964), *aff'd*, Del. Supr., 208 A.2d 55, 59 (1965); *Wilmington Housing Authority v. Harris*, Del. Super., 93 A.2d 518, 521 (1952).

20. CONDEMNATION

DATE OF VALUATION

In this case, the taking of the property by [***Condemning authority's name***] occurred on [___date___]. So you must consider market value on that date rather than the value at any time before or after that date. The just compensation to which the [***landowner's name***] is entitled is the fair market value of the property on [__date__], in view of all the uses and purposes for which the property was then available or adaptable.

Source:

10 *Del. C.* § 6108(e); *Wilmington Housing Authority v. Greater St. John Baptist Church*, Del. Supr., 291 A.d 282, 284 (1972); *State* ex rel. *State Hwy. Dep't v. J.H. Wilkerson & Sons, Inc.*, Del. Supr., 280 A.2d 700, 701 (1971).

20. CONDEMNATION

PARTIAL TAKING

In this case, only part of a piece of land is being taken by the condemning authority. The rest of the land is being left in the owner's hands. In this kind of partial-taking case, the just compensation to which the owner is entitled includes not only compensation for the part of the property being taken, but also compensation for any resulting damage to the value of the rest of the property.

To help determine the just compensation to which the owner is entitled in a partial-taking case, Delaware uses the so-called "before and after" formula. Under this formula, the just compensation is the difference between the market value of the whole piece of land, immediately before (and unaffected by the taking) and the market value of the rest of the property immediately after (and as affected by) the taking.

Source:

State v. Harkins, Del. Super., 732 A.2d 246 (1997)(reviewing methods of valuation and adopting the "subdivision method"); *State* ex rel. *Comm'r v. Rittenhouse*, Del. Super., 621 A.2d 357, 360-61 (1992), *aff'd* 634 A.2d 338 (1993); *City of Milford v. 0.2703 Acres of Land*, Del. Super., 256 A.2d 759, 759-60 (1969); *State* ex rel. *State Hwy. Dep't v. Morris*, Del. Super., 93 A.2d 523, 523 (1952).

20. CONDEMNATION

DEFINITION OF MARKET VALUE

The term "market value" has a special meaning. It is the price that would be agreed on by a willing buyer and a willing seller under usual and ordinary circumstances, without any compulsion whatsoever on the buyer to buy or on the seller to sell. Market value is not what could be obtained for the property under peculiar circumstances, when a greater than fair price could be obtained. It is not a speculative value nor a value obtained due to the special needs of either the buyer or the seller. It is not a value peculiarly personal to the owner. Market value is simply what the property would bring at a fair sale when one party wants to sell and the other wants to buy.

Source:

State v. Harkins, Del. Super., 732 A.2d 246 (1997)(reviewing methods of valuation and adopting the "subdivision method"); *State* ex rel. *Secretary of Dep't of Hwys. & Transp. v. Davis Concrete of Delaware*, Del. Supr., 355 A.2d 883, 886-87 (1976); *State* ex. rel. *Smith v. 16.50, 10.04629, 3.34, 1.84, 5.97741, 3.94 and 7.49319 Acres of Land*, Del. Super., 200 A.2d 241, 244 (1964), *aff'd*, Del. Supr., 208 A.2d 55, 59 (1965). *See also Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.*, Del. Supr., 220 A.2d 778, 779-80 (1966)(assessed value of property is only one indicator of real or market value).

20. CONDEMNATION

CONSIDERATION OF THE AVAILABLE USES OF THE PROPERTY

In determining market value, you may consider the value of the property in view of all its available uses and purposes as of the date of taking. You may also consider the best and most valuable use for which the property is reasonably adaptable to the full extent that the prospect of demand for such use may affect present market value. In other words, if the reasonable probability of the land being put to its highest and best use enhances the present market value of the property, then that enhancement should be taken into account in determining just compensation. The landowner is entitled to have considered not only the general and naturally adapted uses of the property, but also any special value due to its adaptability for a particular or special use. So you may consider the adaptability and availability of the property for a certain purpose or use even though the property has never been put to that purpose or use. But you should not consider remote or purely speculative uses.

Source:

State v. Harkins, Del. Super., 732 A.2d 246 (1997)(reviewing methods of valuation and adopting the "subdivision method"); *State* ex rel. *Secretary of Dep't of Hwys. & Transp. v. Davis Concrete of Delaware, Inc.*, Del. Supr., 355 A.2d 883, 887 (1976); *Wilmington Housing Authority v. Harris*, Del. Super., 93 A.2d 518, 521 (1952).

20. CONDEMNATION

PROBABILITY OF ZONING CHANGE

Market value must ordinarily be determined by considering the use for which the land is adapted and for which it is available. An exception to this general rule exists, however, when evidence shows that there is a reasonable probability of a change in zoning in the near future. The effect of such a probability on the minds of potential buyers may be taken into consideration in arriving at market value.

If you find by a preponderance of the evidence that [***landowner's name***]'s remaining lands were adaptable for [__specify use__], and if you further find by a preponderance of the evidence that there is a reasonable probability of rezoning these lands in the near future to permit [__specify use__], then you may consider the effect of this probability on the market value of [***landowner's name***]'s property.

Source:
New Castle County v. 16.89 Acres of Land, Del. Supr., 404 A.2d 135, 136 (1979); *Board of Education v. 13 Acres of Land*, Del. Super., 131 A.2d 180, 183 (1957).

20. CONDEMNATION

EXCLUSION OF VALUE TO OWNER OR TO CONDEMNING AUTHORITY

In determining market value, you should not consider any value peculiarly personal to the owner, nor should you consider market value to be enhanced by the owner's unwillingness to dispose of the property at the time of the taking. Moreover, market value cannot be measured by the value of the land to [***condemning authority's name***] or by its need for this particular property.

Source:

State ex rel. *Secretary of Dep't of Hwys. & Transp. v. Davis Concrete of Delaware*, Del. Supr., 355 A.2d 883, 886 (1976).

20. CONDEMNATION

RIPARIAN RIGHTS

Riparian rights are those belonging to the owner of the bank of a river or stream.

[***Landowner's name***] has riparian rights to the land under the [__identify river or stream__], which abuts [***his/her/its***] property. These rights include the right to build a wharf, pier, or bulkhead and to fill the ground underneath it, subject only to the reasonable probability of getting permits. You should consider that the [***landowner's name***] is entitled to be compensated for these riparian rights even if the land under the [__identify river or stream__] is already owned by [***condemning authority's name***].

Riparian rights are property rights. They have value that cannot be taken by [***condemning authority's name***] without just compensation.

Source:
See Nugent v. Vallone, R.I. Supr., 161 A.2d 802, 804-05 (1960)(discussing common law right to erect wharf); *State of Delaware v. Pennsylvania Railroad Co.*, Del. Supr., 228 A.2d 587, 594 (1967)(defining a riparian owner).

20. CONDEMNATION

EASEMENTS

Easements are valuable property rights that cannot be taken without compensation. Your determination of fair market value must therefore take into consideration the value of any easements.

Source:
See Wilmington Housing Authority v. Harris, Del. Super., 93 A.2d 518, 521 (1952)(fair market value includes value of property for *all* available uses at time of taking).

20. CONDEMNATION

GENERAL AND SPECIAL BENEFITS

General benefits are benefits resulting from the fulfillment of the public project that necessitated the taking and are common to all lands near the condemnee's property. They are the benefits that accrue to the owners of property within the usable range of the public work.

A special benefit is one that accrues directly and proximately to the particular land remaining after a partial taking by reason of the construction of the public work on the part of the land that was taken, as reflected in an increase in market value of the remaining land. Special benefits arise from the peculiar relation of the land to the public improvement. A benefit may be special even if it is not unique to the particular property at issue. A benefit does not cease to be special merely because it is enjoyed by other residents in the immediate neighborhood.

To be considered at all, a benefit must not be so remote or speculative that it cannot be fairly and accurately measured in dollars and cents. Benefits cannot be considered if they constitute only future possibilities and do not enhance the present value of the property allegedly benefitted, but benefits may be considered if they are fairly sure to be realized.

[***Condemning authority's name***] contends that the improvements to [__identify property__] created [__description of benefit to landowner__].

In determining just compensation, you must consider any special benefits to [***landowner's name***] resulting from the [__alleged beneficial development__], and you must set off the value of any special benefit against whatever loss, detriment, or disadvantage that you find

[***landowner's name***] has sustained or will sustain by reason of the taking and the [__alleged beneficial development__].

But if you find that the [__alleged beneficial development__] constitutes a general benefit, then you cannot set off the value of the general benefit against the loss, detriment, or disadvantage that you find [***landowner's name***] has sustained or will sustain by reason of the taking.

Source:

Acierno v. State ex rel. *Dept. of Transp.*, Del. Supr., 643 A.2d 1328 (1994); *State* ex rel. *State Hwy. Dep't v. J.H. Wilkerson & Sons, Inc.*, Del. Supr., 280 A.2d 700, 701-02 (1971); *City of Milford v. 0.2703 Acres of Land*, Del. Super., 256 A.2d 759, 759-60 (1969); *State* ex rel. *State Hwy. Dep't v. Morris*, Del. Super., 93 A.2d 523, 523 (1952).

PURPOSE OF THE VIEW

You have viewed the premises. The purpose of this viewing was to let you better understand the evidence presented in this hearing and to let you more intelligently apply the evidence to the issue before you. The viewing is not evidence. You should consider the evidence in light of your viewing of the premises, but you must make your determination from the evidence alone.

{**Comment**: *There is a split of authority among jurisdictions as to the evidentiary value of the view. Delaware case law has adopted the minority position that the view is not substantive evidence, but incidental to the fact finder's consideration of the evidence presented in court.*}

Source:
Board of Education v. 13 Acres of Land, Del. Super., 131 A.2d 180, 184 (1957); *Wilmington Housing Authority v. Harris*, Del. Super., 93 A.2d 518, 522 (1952).

20. CONDEMNATION

BURDEN OF PROOF

The burden of establishing market value in a condemnation proceeding is on [***landowner's name***] and not on [***condemning authority's name***]. In this proceeding, therefore, [***landowner's name***] has the burden of proving by a preponderance of the evidence the just compensation to which [***he/she/it***] is entitled.

{*If condemning authority contends that its adjoining development has materially benefitted landowner*}:

[***Condemning authority's name***] has the burden of proving by a preponderance of the evidence that its project resulted in a measurable benefit to [***landowner's name***]'s remaining land. To meet this burden, [***condemning authority's name***] must prove that the increase in value of [***landowner's name***]'s remaining land resulted directly and peculiarly from the public improvement.

Source:
State v.. Rittenhouse, Del. Super., 634 A.2d 338, 344 (1993); *Wilmington Housing Authority v. Harris*, Del. Super., 93 A.2d 518, 521 (1952).

21. PROXIMATE CAUSE

PROXIMATE CAUSE

A party's negligence, by itself, is not enough to impose legal responsibility on that party. Something more is needed: the party's negligence must be shown by a preponderance of the evidence to be a proximate cause of the [__accident / injury__].

Proximate cause is a cause that directly produces the harm, and but for which the harm would not have occurred. A proximate cause brings about, or helps to bring about, the [__accident / injury__], and it must have been necessary to the result.

{*If applicable*}:

There may be more than one proximate cause of an [__accident / injury__.]

Source:
Wilmington Country Club v. Cowee, Del. Supr.,747 A.2d 1087, 1097 (2000); *Duphily v. Delaware Elec. Coop., Inc.*, Del. Supr., 662 A.2d 821, 828 (1995); *Money v. Manville Corp. Asbestos Disease Comp. Trust Fund*, Del. Supr., 596 A.2d 1372, 1375-76 (1991); *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1099 (1991).

21. PROXIMATE CAUSE

CONCURRENT CAUSES

There may be more than one cause of an [__accident / injury__]. The conduct of two or more [__persons, corporations, etc.__] may operate at the same time, either independently or together, to cause [__injury / damage__]. Each cause may be a proximate cause. A negligent party can't avoid responsibility by claiming that somebody else -- not a party in this lawsuit -- was also negligent and proximately caused the [__accident / injury__].

Source:

See Laws v. Webb, Del. Supr., 658 A.2d 1000, 1007-08 (1995).

21. PROXIMATE CAUSE

SUPERSEDING CAUSE

In this case, [***defendant's name***] alleges that [***third party's name***]'s negligence was the only direct cause of [***plaintiff's name***]'s injuries. Just because [***defendant's name***] was negligent and that negligence set in motion the chain of events that caused [***plaintiff's name***]'s injuries does not mean that [***defendant's name***] is liable to [***plaintiff's name***].

One cause of injury may come after an earlier cause of injury. The second is called an intervening cause. The fact that an intervening cause occurs does not automatically break the chain of causation arising from the original cause. There may be more than one proximate cause of an injury. In order to break the original chain of causation, the intervening cause must also be a superseding cause, that is, the intervening act or event itself must not have been anticipated nor reasonably foreseen by the person causing the original injury. An intervening act of negligence will relieve the person who originally committed negligence from liability:

(1) if at the time of the original negligence, the person who committed it would not reasonably have realized that another's negligence might cause harm; or,

(2) if a reasonable person would consider the occurrence of the intervening act as highly extraordinary; or,

(3) if the intervening act was extraordinarily negligent.

If [***third party's name***]'s negligence, coming after [***defendant's name***]'s negligence, was a distinct and unrelated cause of the injuries, and if that negligence could not have been reasonably anticipated, then you may find [***third party's name***]'s negligence to be the sole

proximate cause of the injuries. If you so find, you must return a verdict in favor of [***defendant's name***].

Source:

Delaware Elec. Coop. v. Duphily, Del. Supr., 703 A.2d 1202 (1997); *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 829-30 (1995); *Sears Roebuck & Co. v. Huang*, Del. Supr., 652 A.2d 568, 573-74 (1995); *Sirmans v. Penn*, Del. Supr., 588 A.2d 1103, 1106-07 (1991); *Nutt v. GAF Corp.*, Del. Supr., 526 A.2d 564 (1987); *McKeon v. Goldstein*, Del. Supr., 164 A.2d 260, 262 (1960); *Paris v. Wilmington Medical Center Inc.*, Del. Super., CA. No. 80C-ND-14 (Feb. 13, 1987).

PLAINTIFF SUSCEPTIBLE TO INJURY

The law provides that the defendant in a personal-injury case must take the plaintiff as [***he/she***] finds [***him/her***]. One who causes personal injury to another is liable for all the resulting injuries to the plaintiff, regardless of the nature or severity of those injuries.

{**Comment**: *It may be necessary that the above instruction be used with Jury Instr. Nos. 21.2 and 21.3, "Damages - Pre-Existing or Independent Condition" and "Damages - Aggravation of Pre-Existing Condition."*}

Source:
Reese v. Home Budget Ctr., Del. Supr., 619 A.2d 907, 910 n.1 (1992); *Lipscomb v. Diamiani*, Del. Super., 226 A.2d 914, 918 (1967). *See also* PROSSER & KEETON ON TORTS § 43 (5th ed. 1984).

21. PROXIMATE CAUSE

PROXIMATE CAUSE AND ENHANCED INJURIES

A party's negligence, by itself, is not enough to impose legal responsibility on that party. Something more is needed: the party's negligence must be shown by a preponderance of the evidence to be a proximate cause of the injury.

Proximate cause is a cause that directly produces the harm, and but for which the harm would not have occurred. A proximate cause brings about, or helps to bring about, the injury, and it must have been necessary to the result.

[***Plaintiff's name***] claims that [***he/she***] suffered enhanced injuries as a result of [__describe alleged defective design__]. Enhanced injuries are injuries suffered over and above those that would have resulted had the product been properly designed. In other words, an enhanced injury is the additional injury suffered, if any, as a result of the defective design. To prove that [__describe alleged defective design__] proximately caused [***him/her***] to suffer enhanced injuries, [***plaintiff's name***] must establish:

(1) the injuries that would have occurred had there been a properly designed product; and

(2) the additional injury inflicted because of the defective design.

Source:

Lindahl v. Mazda Motor Corp., Del. Supr., 706 A.2d 526, 532-33 (1998); *see also General Motors Corp. v. Wolhar*, Del. Supr., 686 A.2d 170, 172-73 (1996); *Meekins v. Ford Motor Co.*, Del. Super., 699 A.2d 339, 340-41 (1997).

21. PROXIMATE CAUSE

FORESEEABLE INJURY – DEFINITION

A foreseeable injury is one that an ordinary person, under the circumstances, would recognize or anticipate as creating a risk of injury. It is not necessary that the particular injury suffered was itself foreseeable, but only that the risk of injury existed.

Source:
Delaware Elec. Coop. v. Duphily, Del. Supr., 703 A.2d 1202, 1209-10 (1997); *Duphily v. Delaware Elec. Coop.*, Del. Supr., 662 A.2d 821, 830 (1995)(quoting *Delaware Elec. Coop. v. Pitts*, Del. Supr., No. 90, 1993, Horsey, J. (Oct. 22, 1993)(Order)).

22. DAMAGES

DAMAGES - PERSONAL INJURY

If you do not find that [***plaintiff's name***] has sustained [***his/her***] burden of proof, the verdict must be for [***defendant's name***]. If you do find that [***plaintiff's name***] is entitled to recover for damages proximately caused by the [__accident / injury__], you should consider the compensation to which [***he/she***] is entitled.

The purpose of a damages award in a civil lawsuit is just and reasonable compensation for the harm or injury done. Certain guiding principles must be employed to reach a proper damages award. First, damages must be proved with reasonable probability and not left to speculation. Damages are speculative when there is merely a possibility rather than a reasonable probability that an injury exists. While pain and suffering are proper elements on which to determine monetary damages, the damages for pain and suffering must be fair and reasonably determined and may not be determined by a fanciful or sentimental standard. They must be determined from a conclusion about how long the suffering lasted, the degree of suffering, and the nature of the injury causing the suffering.

If you find for [***plaintiff's name***], you should award to [***him/her***] the sum of money that in your judgment will fairly and reasonably compensate [***him/her***] for the following elements of damages that you find to exist by a preponderance of the evidence:

(1) compensation for pain and suffering that [***he/she***] has suffered to date;

(2) compensation for pain and suffering that it is reasonably probable that [***plaintiff's name***] will suffer in the future;

(3) compensation for permanent impairment;

(4) compensation for reasonable and necessary medical expenses incurred to date;

(5) compensation for reasonable and necessary medical expenses that it is reasonably probable that [***plaintiff's name***] will incur in the future;

(6) compensation for loss of earnings suffered to date; and

(7) compensation for earnings that will probably be lost in the future.

In evaluating pain and suffering, you may consider its mental as well as its physical consequences. You may also consider such things as discomfort, anxiety, grief, or other mental or emotional distress that may accompany any deprivation of usual pleasurable activities and enjoyments.

In evaluating impairment or disability, you may consider all the activities that [***plaintiff's name***] used to engage in, including those activities for work and pleasure, and you may consider to what extent these activities have been impaired because of the injury and to what extent they will continue to be impaired for the rest of [***his/her***] life expectancy. [It has been agreed that a person of [***plaintiff's name***]'s age and sex would have a life expectancy of ___ years.]

The law does not prescribe any definite standard by which to compensate an injured person for pain and suffering or impairment, nor does it require that any witness should have expressed an opinion about the amount of damages that would compensate for such injury. Your award should be just and reasonable in light of the evidence and reasonably sufficient to compensate [***plaintiff's name***] fully and adequately.

{**Comment**: *This instruction almost always needs to be tailored to the particular facts of each claim for damages.*}

Source:

Medical Ctr. of Delaware, Inc. v. Lougheed, Del. Supr., 661 A.2d 1055, 1060-61 (1995)(discussing issue of excessive awards for damages); *Jardel Co. v. Hughes*, Del. Supr., 523 A.2d 518, 527-32 (1987)(discussing compensatory and punitive damages); *McNally v. Eckman*, Del. Supr., 466 A.2d 363, 371 (1983)(allowances for likely promotions and pay increases proper in award of damages); *Thorpe v. Bailey*, Del. Supr., 386 A.2d 668, 668-70 (1978)(reduction of award to present value); *Steppi v. Stromwasser*, Del. Supr., 297 A.2d 26, 27-28 (1972)(future earnings must be reduced to present value); *Henne v. Balick*, Del. Supr., 146 A.2d 394 (1958)(requiring evidence of reasonable probability for loss of future earnings); *Biggs v. Strauss,* Del. Super., C.A. No. 81C-OC-46, Poppiti, J. (October 22, 1984), *aff'd*, Del. Supr., 525 A.2d 992 (1987); *Baker v. Streets*, Del. Super., C.A. No. 84C-MR-18, Taylor, J. (July 25, 1985); *Coleman v. Garrison*, Del. Super., 281 A.2d 616, 619 (1971); *Biddle v. Griffin*, Del. Super., 277 A.2d 691, 692 (1970); *J.J. White, Inc. v. Metropolitan Merchandise Mart*, Del. Super., 107 A.2d 892, 894 (1954)(measure of damages in the absence of any willful, wanton, or intentional wrong-doing is the loss or injury resulting from the wrongful act of the defendant); *Kane v. Reed*, Del. Super., 101 A.2d 800, 802-04 (1954); *Prettyman v. Topkis*, Del. Super., 3 A.2d 708, 710-12 (1939); *Balick v. Philadelphia Dairy Products Co.*, Del. Super., 162 A. 776, 779 (1932).

22. DAMAGES

PREEXISTING OR INDEPENDENT CONDITION

A party is not entitled to recover any damages for pain and suffering, loss of income, or other alleged injuries, not caused by [***defendant's name***]. Therefore, if you find that [***plaintiff's name***] had the injuries for which [***he/she***] claims here before the accident or apart from the accident, then I instruct you that for the portion of the injuries that you find were not caused by the accident, there can be no recovery by [***plaintiff's name***].

{**Comment**: *See also Jury Instr. No. 10.4, "Susceptible Plaintiff," for situations in which the extent of the injuries suffered is unexpectedly high due to the unusual physical or mental condition of the plaintiff before the injury occurred.*}

Source:
Braunstein v. Peoples Ry. Co., Del. Super., 78 A. 609, 611 (1910). *See also, supra*, Jury Instr. No. 10.1 (Proximate Cause).

AGGRAVATION OF PREEXISTING CONDITION

An issue in this case is whether [***plaintiff's name***] had a preexisting condition that caused pain and suffering before the accident and that would have continued to exist after the accident, even if the accident had not occurred. If you find that [***plaintiff's name***] had a preexisting condition, then [***plaintiff's name***] is entitled to recover only for the aggravation or worsening of [***his/her***] preexisting condition.

{**Comment**: *See also Jury Instr. No. 10.4, "Susceptible Plaintiff," for situations in which the extent of the injuries suffered is unexpectedly high due to the unusual physical or mental condition of the plaintiff before the injury occurred.*}

Source:

Maier v. Santucci, Del. Supr., 697 A.2d 747, 749 (1997); *Coleman v. Garrison*, Del. Super., 281 A.2d 616, 619 (1971), *conformed to*, Del. Super., 327 A.2d 757, 761 (1974), *aff'd*, Del. Supr., 349 A.2d 8 (1975)(generally tortfeasor must place injured party in same financial position had there been no tort); *J.J. White, Inc. v. Metropolitan Merchandise Mart*, Del. Super., 107 A.2d 892 (1954)(measure of damages in the absence of any willful, wanton, or intentional wrong doing is the loss or injury resulting from the wrongful act of the defendant).

22. DAMAGES

MITIGATION OF DAMAGES -- PERSONAL INJURY

An injured party must exercise reasonable care to reduce the damages resulting from the injury. If you find that [***plaintiff's name***] failed to undergo reasonable medical treatment to reduce [***his/her***] damages, [__or that [***he/she***] failed to follow reasonable medical advice__], then any damages resulting from that failure are not the responsibility of [***defendant's name***] and should not be included in your award.

Source:

Lynch v. Vickers Energy Corp., Del. Supr., 429 A.2d 497, 504 (1981)(proper measure of injured party's mitigation of damages depends upon circumstances of the case); *Gulf Oil Co. v. Slattery*, Del. Supr., 172 A.2d 266, 270 (1961)(duty of person injured in tort to take all reasonable steps to minimize damages); *American General Corp. v. Continental Airlines*, Del. Ch., 622 A.2d 1, 11, *aff'd*, Del. Supr., 620 A.2d 856 (1992)(general duty to mitigate damages does not require injured party to take unreasonable or speculative steps to meet that duty); *MacArtor v. Graylyn Crest III Swim Club, Inc.*, Del. Ch., 187 A.2d 417, 421 (1963)(refusal of injured party to accept alternative compensation offered by defendant precludes recovery of damages).

Coleman v. Garrison, Del. Super., 281 A.2d 616, 619 (1971)(duty of injured party to mitigate financial consequences of defendant's negligence), *appeal dismissed*, *Wilmington Medical Ctr., Inc. v. Coleman*, Del. Supr., 298 A.2d 320 (1972), *conformed to*, Del. Super., 327 A.2d 757, 761 (1974)(speculative damages not allowed), *aff'd*, Del. Supr., 349 A.2d 8 (1975); *Meding v. Robinson*, Del Super., 157 A.2d 254, 257 (1959)(refusal of injured party to continue medical treatment after certain point in time precluded recovery of damages for pain and suffering after treatment terminated), *aff'd*, Del. Supr., 163 A.2d 272 (1960).

22. DAMAGES

MEASURE OF DAMAGES - PROPERTY

If you find that [***plaintiff's name***] is entitled to recover for property damages that were proximately caused by the actions of [***defendant's name***], you should consider the compensation to which [***plaintiff's name***] is entitled. The proper measure of compensation is the difference between the value of the property before the damage and the value afterward.

Source:

Del. C. Super. Ct. Civ. R. 9(g) (claim for damages may be generally stated except special damages which shall be specifically stated); *Alber v. Wise,* Del. Supr., 166 A.2d 141, 142-43 (1960)(using before and after rule to determine damages); *Twin Coach Co. v. Chance Vought Aircraft, Inc.*, Del. Super., 163 A.2d 278, 286 (1960); *Wills v. Shockly*, Del. Super., 157 A.2d 252, 254 (1960); *cf. Stitt v. Lyon*, Del. Super., 103 A.2d 332, 333-34 (1954)(specificity required under Rule 9(g) not as demanding as required in common law pleading).

See also Pan Am. World Airways v. United Aircraft Corp., Del. Super., 192 A.2d 913, 918-19 (1963), *aff'd*, Del. Supr., 199 A.2d 758 (1964); *Catalfano v. Higgins*, Del. Super., 191 A.2d 330, 333 (1963); *Adams v. Hazel*, Del. Super, 102 A.2d 919, 920 (1954).

22. DAMAGES

{**Comment**: *Awarding damages to an injured child often poses a difficult problem to the jury, especially with regard to such items as loss of future earnings and long-term pain and suffering. In such circumstances, it may be necessary to emphasize that the jury use its common sense and do the best it can with criteria enumerated in Jury Instr. No. 21.1. A special instruction, however, should not be necessary.*}

Source:

Excessive Damages: *Cloroben Chemical Corp. v. Comegys*, Del. Supr., 464 A.2d 887, 893 (1983)(discussing issue of excessive damage award to minor injured when chemicals burned over 20% of her body); *Wilmington Housing Authority v. Williamson*, Del. Supr., 228 A.2d 782, 788-89 (1967)(award of $200,000 for loss of arm and leg and permanent disability by four-year old not excessive); *Arnett v. Hanby*, Del. Super., 262 A.2d 659, 660 (1970)(damage award for injuries suffered by young boy sustained as proper).

Inadequate Damages: *See Mills v. Telenczak*, Del. Supr., 345 A.2d 424, 426 (1975).

LOSS OF CONSORTIUM

When a married person is injured and that injury causes the person's spouse to suffer the loss of the company, cooperation, affection, and aid that were previously a feature of their married life, the spouse is entitled to recover damages in [***his/her***] own right for this loss. This claim is known as "loss of consortium."

To recover for loss of consortium, [***spouse's name***] need not prove a total loss. It is enough that partial loss or impairment of services, companionship, and comfort is shown. Any lessening of these aspects of a normal marital relationship due to the injury of a healthy [***wife/husband***] is considered an element of damages under the law.

There is no yardstick or formula for assessing damages for loss of consortium, just as there is none for pain and suffering. The amount of damages to be awarded is what you decide is fair and reasonable, under all the circumstances, as disclosed by the evidence.

Source:

18 *Del. C.* § 6853 (personal injury requires expert testimony except in limited number of circumstances); *Sostre v. Swift*, Del. Supr., 603 A.2d 809, 813 (1992); *Jones v. Elliot*, Del. Supr., 551 A.2d 62, 63-65 (1988); *Folk v. York-Shipley, Inc.*, Del. Supr., 239 A.2d 236, 238-39 (1968)(applying Pennsylvania law); *Senta v. Leblang*, Del. Supr., 185 A.2d 759, 762 (1962).

Gill v. Celotex Corp., Del. Super., 565 A.2d 21, 23-24 (1989); *Mergenthaler v. Asbestos Corp. of America*, Del. Super., 534 A.2d 272, 280-81 (1987); *Baker v. Streets*, Del. Super., C.A. No. 84C-MR-18, Taylor, J. (July 25, 1985); *Lacy v. G.D. Searle & Co.*, Del. Super., 484 A.2d 527, 532-33 (1984); *Biddle v. Griffin*, Del. Super., 277 A.2d 691, 692-93 (1970).

WRONGFUL DEATH

The law recognizes that when a person dies as the result of another's wrongful conduct, there is injury not only to the deceased but also to immediate family members. While it is impossible to compensate the deceased for the loss of [***his/her***] life, it is possible to compensate certain family members for the losses that they have suffered from the death of a loved one. For this reason, Delaware law provides that when a person dies as a result of another's wrongful act, certain family members may recover fair compensation for their losses resulting from the death. In determining a fair compensation, you may consider the following:

(1) the loss of the expectation of monetary benefits that would have resulted from the continued life of [***decedent's name***]; that is, the expectation of inheritance that [***name of family beneficiaries***] have lost;

(2) the loss of the portion of [***decedent's name***]'s earnings and income that probably would have been used for the support of [***names of family beneficiaries***];

(3) the loss of [***decedent's name***]'s parental, marital, and household services, including the reasonable cost of providing for the care of minor children;

(4) the reasonable cost of funeral expenses, not to exceed $2000; and

(5) the mental anguish suffered by [***names of eligible family beneficiaries***] as a result of [***decedent's name***]'s death.

The term "mental anguish" encompasses the grieving process associated with the loss of a loved one. You may consider that the grieving process, accompanied by its physical and emotional upheaval, will be experienced differently by different people, both in its intensity and in its duration. The ability to cope with the loss may be different for each person.

There is no fixed standard or measurement. You must determine a fair and adequate award through the exercise of your judgment and experience after considering all the facts and circumstances presented to you during the trial.

While [***plaintiff's name***] carries the burden of proving [***his/her/their***] damages by a preponderance of the evidence, [***he/she/they***] [***is/are***] not required to claim and prove with mathematical precision exact sums of money representing their damages for mental anguish. It is required only that [***plaintiff's name***] furnish enough evidence so that you, the jury, can make a reasonable determination of those damages.

Source:

10 *Del. C.* § 3724 (Wrongful Death Statute)(as amended June 14, 1999). *Bennett v. Andree*, Del. Supr., 252 A.2d 100, 101-03 (1969); *Gill v. Celotex Corp.*, Del. Super., 565 A.2d 21, 23-24 (1989)(mental anguish); *Saxton v. Harvey & Harvey*, Del. Super., C.A. No. 85C-JL-3, Poppiti, J. (April 14, 1987); *Sach v. Kent Gen. Hosp.*, Del. Super., 518 A.2d 695, 696-97 (1986)(claim by surviving parents); *Okie v. Owens*, Del. Super., C.A. No. 83C-AP-15, Poppiti, J. (October 16, 1985).

See also Frantz v. United States, D. Del., 791 F. Supp. 445, 448 (1992)(proper beneficiaries of claim for wrongful death); *Johnson v. Physicians Anesthesia Serv.*, D. Del., 621 F. Supp., 908, 915-16 (1985)(action and potential damages arise only after time of death).

INCREASED RISK OF HARM

Increased risk of harm, in this case risk of [__e.g., metastasis and death__], is an element of damages that you may consider. [__e.g., Metastasis is the medical term given to the spreading of cancer from the primary site to other parts of the body.__] You may award damages for an increased risk of [__e.g., metastasis and death__] if the evidence establishes with a reasonable degree of medical probability that [***defendant's name***]'s conduct caused an appreciable increase in the risk of [__e.g., metastasis of (***plaintiff's name***)'s cancer and (***his/her***) ultimate death__].

If you award damages for an increased risk of [__e.g., metastasis and death__], you should take into account that there would have been some risk of [__metastasis and death__] even if [__***plaintiff's name***'s cancer had been promptly discovered and treated__]. You may award damages only to the extent of any increase in the risk of [__e.g., metastasis and death__] resulting from medical malpractice.

Source:
United States v. Anderson, Del. Supr., 669 A.2d 73, 74, 78 (1995)(holding "increased risk of harm" may be raised as one element in claim for damages arising from medical malpractice); *cf. United States v. Cumberbatch*, Del. Super., 647 A.2d 1098, 1103 (1994)(holding "loss of chance" claim is not viable under Delaware's wrongful death statute).

22. DAMAGES

DAMAGES - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

If you find that [***plaintiff's name***] has proven the liability of [***defendant's name***] for the intentional infliction of severe emotional distress, then you may consider the amount of damages that [***plaintiff's name***] may recover.

The purpose of an award of damages in a civil lawsuit is just and reasonable compensation for the harm done. Certain guiding principles of law must be employed to reach a proper damages award. One principle is that in order to be recoverable damages must be proved with reasonable probability and not left to speculation. Damages are termed speculative when there is merely a possibility rather than a reasonable probability that an injury exists. While pain and suffering are proper elements on which to determine monetary damages, damages for pain and suffering must be fair and reasonably determined and not determined by a fanciful or sentimental standard. They must be determined from a conclusion of the length of suffering, the degree of suffering, and the nature of the injury causing the suffering. If you find for [***plaintiff's name***], you should award [***him/her***] such sum of money as in your judgment will fairly and reasonably compensate [***him/her***] for the following elements of damages which you find to exist by a preponderance of the evidence:

{*Where there is no evidence of physical injury*}:

Any monetary expenses, mental pain and suffering, fright, nervousness, indignity, humiliation, embarrassment, and insult that plaintiff was subjected to or will be subjected to in the future that are a direct result of [***defendant's name***]'s conduct.

The law does not prescribe any definite standard by which to compensate an injured person for mental pain and suffering and other aspects of severe emotional distress, nor does it require that any witness express an opinion as to the amount of damages that would compensate for that injury. Your award should be just and reasonable in light of the evidence and reasonably sufficient to compensate [***plaintiff's name***] fully and adequately.

{*Where there has been physical injury*}:

(1) compensation for pain and suffering that [***he/she***] has suffered to date;

(2) compensation for pain and suffering that it is reasonably probable that [***plaintiff's name***] will suffer in the future;

(3) compensation for permanent impairment;

(4) compensation for reasonable and necessary medical expenses incurred to date;

(5) compensation for reasonable and necessary medical expenses that it is reasonably probable that [***plaintiff's name***] will incur in the future;

(6) compensation for loss of earnings suffered to date; and

(7) compensation for earnings that will probably be lost in the future.

The law does not prescribe any definite standard to compensate an injured person for pain and suffering, mental anguish, impairment or disfigurement nor does it require that any witness express an opinion about the amount of damages that would compensate for such injury. Your

award should be just and reasonable in light of the evidence and reasonably sufficient to compensate [***plaintiff's name***] fully and adequately.

{**Comment**: *This instruction will need to be tailored to the particular facts of the claim. This instruction may be readily adapted to any intentional tort.*}

Source:

Cummings v. Pinder, Del. Supr., 574 A.2d 843, 845 (1990)(recovery for emotional distress arising out of outrageous conduct in attorney-client relationship); *Garrison v. Medical Ctr. of Delaware*, Del. Supr., 581 A.2d 288, 289 (1989)(no recovery on claim of emotional distress without physical harm to claimant); *Mancino v. Webb*, Del. Super., 274 A.2d 711, 714 (1974)(parents may not recover for damages for mental anguish suffered as a result of unwitnessed assault and battery upon their child). *See also* RESTATEMENT (SECOND) OF TORTS § 47(b) (emotional distress - damages).

22. DAMAGES

DAMAGES -- MALICIOUS PROSECUTION

If you find that [***plaintiff's name***] has proved that [***defendant's name***] is liable for malicious prosecution, then you should consider the amount of damages [***plaintiff's name***] is entitled to recover. In making an award, you may consider the following factors:

(1) the harm to [***plaintiff's name***]'s reputation resulting from the accusation brought against [***him/her***]; and

(2) the emotional distress resulting from the proceedings.

{*If the plaintiff has pleaded special damages, the following factors may also be considered*}:

(3) the harm caused by any arrest or imprisonment suffered by [***plaintiff's name***] during the prosecution;

(4) the expense that [***he/she***] has reasonably incurred in defending [***himself/herself***] against the accusation; and

(5) any specific monetary loss caused by the proceedings.

You may presume that [***plaintiff's name***] suffered injury to [***his/her***] reputation as well as emotional distress, mental anguish, and humiliation that would normally result from [***defendant's name***]'s conduct. This means you need not have proof that [***plaintiff's name***] suffered any particular injury to [***his/her***] reputation or that [***plaintiff's name***] in fact suffered emotional distress, mental anguish, and humiliation in order to award [***him/her***] damages.

In determining the amount of an award, you also may consider the character of [***plaintiff's name***] and [***his/her***] general standing and reputation in the community; the publicity surrounding [***defendant's name***]'s act; and the probable effect that [***defendant's name***]'s conduct had on [***plaintiff's name***]'s trade, business, or profession and the harm sustained as a result.

[If [***defendant's name***] made a public retraction of [____state claim____] or an apology to those who learned of the [____state claim____], that fact, together with the timeliness and adequacy of the retraction or apology, is important in determining the probable harm to [***plaintiff's name***]'s reputation].

Source:

Marshall v. Cleaver, Del. Super., 56 A. 380, 381 (1903)(false arrest); *Petit v. Colmary*, Del. Super., 55 A. 344, 345-46 (1903)(recognizing recovery for loss of time, physical and mental suffering, expenses incurred, indignity, shame, humiliation and disgrace for false imprisonment or arrest). *See also* RESTATEMENT (SECOND) OF TORTS §§ 670, 681-682 (1965)(specific proof of injury to a plaintiff's reputation and of a plaintiff's emotional distress, mental anguish, and humiliation is not required; such injury is presumed).

22. DAMAGES

DAMAGES - ABUSE OF CIVIL PROCESS

If you find that [***plaintiff's name***] has proved [***defendant's name***] is liable for abuse of civil process, then you should consider the amount of damages [***plaintiff's name***] is entitled to recover. In making an award, you may consider the following factors:

(1) the harm resulting from any disposition or interference with the advantageous use of [***plaintiff's name***]'s property suffered during the course of the proceedings;

(2) the harm to [***his/her***] reputation by any defamatory matter alleged as the basis of the proceedings;

(3) the expense reasonably incurred in defending [***himself/herself***] against the proceedings;

(4) any specific monetary loss that resulted from the proceedings; and

(5) any emotional distress caused by the proceedings.

You may presume that [***plaintiff's name***] suffered injury to [***his/her***] reputation as well as emotional distress, mental anguish, and humiliation that would normally result from [***defendant's name***]'s conduct. This means you need not have proof that [***plaintiff's name***] suffered any particular injury to [***his/her***] reputation or that [***plaintiff's name***] in fact suffered emotional distress, mental anguish, or humiliation in order to award [***him/her***] damages.

In determining the amount of an award, you also may consider the character of [***plaintiff's name***] and [***his/her***] general standing and reputation in the community; the publicity surrounding [***defendant's name***]'s act; and the probable effect that [***defendant's name***]'s conduct had on [***plaintiff's name***]'s trade, business, or profession, and the harm sustained as a result.

[If [***defendant's name***] made a public retraction of [____state claim____] or an apology to those who learned of the [____state claim____], that fact, together with the timeliness and adequacy of the retraction or apology, is important in determining the probable harm to [***plaintiff's name***]'s reputation].

Source:

Marshall v. Cleaver, Del. Super., 56 A. 380, 381 (1903)(false arrest); *Petit v. Colmary*, Del. Super., 55 A. 344, 345-46 (1903)(recognizing recovery for loss of time, physical and mental suffering, expenses incurred, indignity, shame, humiliation and disgrace for false imprisonment or arrest). *See also* RESTATEMENT (SECOND) OF TORTS §§ 670, 681-682 (1965)(specific proof of injury to a plaintiff's reputation and of a plaintiff's emotional distress, mental anguish, and humiliation is not required; such injury is presumed).

22. DAMAGES

DEFAMATION - DAMAGES -- COMPENSATORY OR NOMINAL

If you find that [***plaintiff's name***] has not sustained [***his/her/its***] burden of proof, the verdict must be for [***defendant's name***]. If you do find that [***plaintiff's name***] is entitled to recover for damages that were proximately caused by the defamatory statements of [***defendant's name***], you should consider the compensation to which [***he/she/it***] is entitled.

In determining the amount of compensatory damages for defamation, you must consider all the facts and circumstances of the case as revealed by the evidence. Factors to consider include:

(1) the nature and character of the statements in [__describe medium of defamation__];

(2) the language used;

(3) the occasion when the statements were published;

(4) the extent of their circulation;

(5) the probable effect on those to whose attention they came; and

(6) the probable and natural effect of the defamatory statements on [***plaintiff's name***]'s business, personal feelings, and standing in the community.

You should award [***plaintiff's name***] damages that will fairly and adequately compensate [***him/her/it***] for:

(1) any damage to [***his/her/its***] reputation and standing in the community;

(2) any emotional distress, embarrassment, humiliation and mental suffering endured by [***him/her/it***], and any physical or bodily harm caused by that suffering; and

(3) any special injury such as monetary loss suffered by the plaintiff.

Your award must be based on the evidence and not on speculation. The law does not furnish any fixed standards by which to measure damage to reputation or mental suffering, and counsel are not permitted to argue that a specific sum would be reasonable. You must be governed by your own experience and judgment, by the evidence in the case, and by the purpose of a damages award: fair and reasonable compensation for harm wrongfully caused by another.

A person who has been defamed but who has not suffered any injury may recover nominal damages, usually in the amount of $1.00.

Source:

Kanaga v. Gannett Co., Inc., Del. Supr., 687 A.2d 173 (1996); *Gannett Co., Inc. v. Kanaga*, Del. Supr., __ A.2d __, No. 352, 1998, Walsh, J. (May 3, 2000); *Sheeran v. Colpo*, Del. Supr., 460 A.2d 522 (1983); *Spence v. Funk*, Del. Supr., 396 A.2d 967, 970-71 (1978); *Ramada Inns, Inc. v. Dow Jones & Co.*, Del. Super., 543 A.2d 313, 330-31 (1987); *Re v. Gannett Co.*, Del. Super., 480 A.2d 662 (1984) *aff'd*, Del. Supr., 496 A.2d 553 (1985); *Stidham v. Wachtel*, Del. Super., 21 A.2d 282, 282-83 (1941). *See also* RESTATEMENT (SECOND) OF TORTS §§ 621-623 (1965).

22. DAMAGES

DEFAMATION - DAMAGES -- DUTY TO MITIGATE

A person who has been defamed must use reasonable efforts, to minimize the effect of the defamation. Failure of [***plaintiff's name***] to make a reasonable effort to minimize [***his/her/its***] damages does not prevent all recovery, but it does prevent recovery of the damages that might otherwise have been avoided.

Source:

Gulf Oil Corp. v. Slattery, Del. Supr., 172 A.2d 266, 270 (1961). *See Wachs v. Winter*, E.D.N.Y., 569 F. Supp. 1438, 1446 (1983). *See also* DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 85.13 (4th ed. 1987); MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES, §33 at 127 (1935); Murasky, *Avoidable Consequences in Defamation: The Common-Law Duty to Request a Retraction*, 40 RUTGERS LAW REV. 167 (1987).

22. DAMAGES

DEFAMATION - PUNITIVE DAMAGES -- MEDIA DEFENDANT

For [***plaintiff's name***] to recover punitive damages, you must find that [***defendant's name***] acted with "actual malice." A publication is made with actual malice if it is made with knowledge that it is false or with reckless disregard of whether or not it is false.

If you find that the [***plaintiff's name***] has established the essential elements of [***his/her/its***] claim, and if you also find, on the basis of clear and convincing evidence, that [***defendant's name***] acted with actual malice in publishing the defamatory statement in question, then you may award [***plaintiff's name***] punitive damages in addition to actual damages. Punitive damages are designed to punish the offender and serve as an example to others. You must decide whether to award punitive damages and, if so, how much to award.

In making this decision, you must consider the reprehensibility or outrageousness of [***defendant's name***]'s conduct and the amount of punitive damages that will deter [***defendant's name***] and others like [***him/her/it***] from similar conduct in the future. You may consider [***defendant's name***]'s financial condition for this purpose only. [***Defendant's name***]'s financial condition may not be considered in assessing compensatory damages. Any award of punitive damages must bear a reasonable relation to [***plaintiff's name***]'s compensatory or nominal damages.

If you find that [***plaintiff's name***] is entitled to punitive damages, you must state the amount of punitive damages separately on the special-verdict form.

{**Comment**: *If the defendant is not an entity of the media, the burden of proof on the plaintiff is by a preponderance of the evidence.*}

Source:

Kanaga v. Gannett Co., Inc., Del. Supr., 687 A.2d 173, 183 (1996); *Gannett Co., Inc. v. Kanaga*, Del. Supr., __ A.2d __, No. 352, 1998, Walsh, J. (May 3, 2000); *Gannett Co. v. Re*, Del. Supr., 496 A.2d 553, 558 (1985); *Sheeren v. Colpo*, Del. Supr., 460 A.2d 522, 524-25 (1983); *Stidham v. Wachtel*, Del. Super., 21 A.2d 282, 283 (1941).

22. DAMAGES

DAMAGES - INVASION OF PRIVACY

If you find that [***plaintiff's name***] has not sustained [***his/her***] burden of proof, the verdict must be for [***defendant's name***]. If you do find that [***plaintiff's name***] is entitled to recover for damages that were proximately caused by the invasion of [***his/her***] privacy by [***defendant's name***], you should consider the compensation to which [***plaintiff's name***] is entitled.

[***Plaintiff's name***] is entitled to be fairly and adequately compensated for the injuries that you believe [***he/she***] suffered as a result of [***defendant's name***]'s invasion of [***his/her***] privacy. [***Plaintiff's name***] may recover damages for the following injuries:

(1) the harm to [***his/her***] interest in privacy;

(2) the mental distress suffered as a result of the invasion of privacy;

(3) any other injuries suffered as a result of the invasion of privacy; and

(4) punitive damages if there was malicious or intentional desire to injure or hurt [***plaintiff's name***].

Your award must be based on the evidence and not on mere speculation. The law does not furnish any fixed standards by which to measure damages for invasion of privacy or for mental suffering, and counsel are not permitted to argue that a specific sum would be reasonable. You must be governed by your own experience and judgment, by the evidence in the case, and by the purpose of a damages award: fair and reasonable compensation for harm wrongfully caused by another.

If you find that [***defendant's name***] conduct constituted an invasion of privacy by that the plaintiff did not suffer an injury to justify compensation then [***plaintiff's name***] may recover nominal damages, usually in the amount of $1.00.

Source:

Reardon v. News Journal, Del. Supr., 164 A.2d 263, 266 (1960); *Gutheridge v. Pen-Mod, Inc.*, Del. Super., 239 A.2d 709, 714-15 (1967). *See also* RESTATEMENT (SECOND) OF TORTS § 652H (1965).

22. DAMAGES

{**Comment**: *Delaware recognizes two measures for damages in cases of fraud or deceit and for violations of the Consumer Fraud Act. Depending on how the damages are pleaded in the complaint, or later amended, a plaintiff may recover under either theory.*}

DAMAGES - FRAUD: BENEFIT OF THE BARGAIN RULE

If you find that [***defendant's name***] has committed fraud, then [***plaintiff's name***] is entitled to damages that will put [***him/her/it***] in the same financial position that would have existed had [***defendant's name***]'s representation been true. Your award should reflect the difference in value between the actual value of [__describe the transaction__] and the value represented by [***defendant's name***]. [This goal can also be achieved by awarding (***plaintiff's name***) the cost of putting the (__item of the fraud__) in the condition in which it was represented to be -- that is, the cost of repairs.]

DAMAGES - FRAUD: OUT-OF-POCKET MEASURE OF LOSS

If you find that [***defendant's name***] has committed fraud, then [***plaintiff's name***] is entitled to damages that will give [***him/her/it***] the difference in value between what [***he/she/it***] paid and the actual value of [__describe the item fraudulently represented__]. This award of damages is intended to put [***plaintiff's name***] back in the same financial position [***he/she/it***] occupied before the transaction took place.

Source:

Stephenson v. Capano Dev., Inc., Del. Supr., 462 A.2d 1069, 1076 (1983)(applying benefit-of-the-bargain rule); *Harman v. Masoneilan Intern Inc.*, Del. Supr., 442 A.2d 487, 499 (1982)(damages limited to direct and proximate losses, which represent loss-of-the-bargain or actual out-of-pocket losses); *Young v. Joyce*, Del. Supr., 351 A.2d 857, 859 (1975)(cost of repairs); *Nye Oderless Incinerator Corp. v. Felton*, Del. Super., 162 A. 504, 510-11 (1931)(damages are the difference between the real value of the item and the represented value thereof).

DAMAGES:

INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

The plaintiff is entitled to be fairly and adequately compensated for:

(1) the monetary loss of the contractual benefits suffered by the plaintiff;

(2) all other losses suffered by the plaintiff as a direct result of the defendant's act; and

(3) the emotional distress and harm to the plaintiff's reputation suffered by the plaintiff as a result of the defendant's act.

Source:

De Bonaventura v. Nationwide Mut. Ins., Del. Ch., 419 A.2d 942 (1980), *aff'd*, Del. Supr., 428 A.2d 1151 (1981); *Bowl-Mor Company Inc. v. Brunswick Corp.*, Del. Ch., 297 A.2d 61, *appeal dismissed*, 297 A.2d 67 (1972); *Murphy v. Godwin*, Del. Super., 303 A.2d 668 (1973). *See also* RESTATEMENT (SECOND) OF TORTS § 774A (1965).

22. DAMAGES

SETTLING CO-DEFENDANT

When this case began, [***plaintiff's name***] alleged in the complaint that the joint negligence of [non-settling-***defendant's name***] and [settling-***defendant's name***] was the proximate cause of [***plaintiff's name***]'s injuries. [Before / during] this trial, [settling-***defendant's name***] reached a settlement with [***plaintiff's name***] on all of [***plaintiff's name***]'s claims against [***him/her***]. Your deliberations, however, must determine whether [non-settling-***defendant's name***], [settling-***defendant's name***], or both of them were negligent and whether that negligence was the proximate cause of the injuries to [***plaintiff's name***].

[Non-settling-***defendant's name***] has asserted a cross-claim against [settling-***defendant's name***], asserting that [***his/her***] negligence was the proximate cause of the injuries to [***plaintiff's name***]. You must determine whether either or both of [***defendant's names***] were negligent, and whether that negligence proximately caused [***plaintiff's name***]'s injuries. If you find that either one or both of the defendants were guilty of negligence and that the negligence was a proximate cause of the injuries to [***plaintiff's name***], you must then determine the amount of damages you should award to [***plaintiff's name***] to compensate [***him/her***] fairly and reasonably for [***his/her***] injuries.

{*If there was a settlement, add the following*}:

In computing these damages, don't be concerned with the fact that a settlement was made with [***plaintiff's name***]. You must not speculate about what [***plaintiff's name***] may have or

should have received in that settlement. If you find from the evidence that both [***defendants' names***] were guilty of negligence proximately causing [***plaintiff's name***]'s injuries, then you should award damages to compensate [***plaintiff's name***] for [***his/her***] fair and reasonable damages in full. In addition, you should apportion your verdict to attribute a percentage of negligence to each defendant in a percentage range from zero to 100. You will be provided with a verdict form to guide you in this process.

Source:

10 *Del. C.* § 6301 et seq.; *Medical Ctr. of Delaware, Inc. v. Mullins*, Del. Supr., 637 A.2d 6, 7-9 (1994); *Ikeda v. Molock*, Del. Supr., 603 A.2d 785, 786-88 (1991); *Blackshear v. Clark*, Del. Supr., 391 A.2d 747, 748 (1978); *Farrall v. A.C. & S. Co.*, Del. Super., 586 A.2d 662, 663-66 (1990).

22. DAMAGES

STIPULATION REGARDING MEDICAL BILLS TO DATE

The parties have agreed that the medical bills incurred to date by [***plaintiff's name***] following the accident at [__identify location, etc.__] amounted to [$_____.__]. Counsel for [***defendant's name***] has not agreed, however, that those medical bills [proximately resulted from the alleged negligence of ***defendant's name***] [and/or] [were for reasonably necessary medical treatment]. You may award [***plaintiff's name***] the amount of the medical bills if you find that those bills reflecting the medical treatment of [***plaintiff's name***] [proximately resulted from the negligence of ***defendant's name***] [and/or] [were reasonable and necessary].

22. DAMAGES

WORKER'S COMPENSATION

You have heard testimony about the worker's compensation benefits that [***plaintiff's name***] has received. You should not consider the fact that some of the medical expenses and lost wages that [***he/she***] claims in this lawsuit have been paid through worker's compensation because [***plaintiff's name***] has a legal obligation to repay this compensation from any money that you might award in this case. On the other hand, if [***he/she***] does not recover in this case, there is no obligation for [***plaintiff's name***] to reimburse.

{**Comment**: *The collateral source rule does not apply to worker's compensation payments relevant to a claim for damages arising from medical negligence. See 18* Del. C. *§ 6862.*}

Source:
19 *Del. C.* § 2363(e); *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 834-35 (1995); *State v. Calhoun*, Del. Supr., 634 A.2d 335, 337-38 (1993); *Cannon v. Container Corp. of Am.*, Del. Supr., 282 A.2d 614, 616 (1971); *but see Baio v. Commercial Union Ins. Co.*, Del. Supr., 410 A.2d 502, 507-08 (1979)(in case where employer, or employee's carrier, has a conflict of interest with injured worker pursuing a right of subrogation, principles of equity apply and carrier's right of subrogation may be waived).

22. DAMAGES

MEDICARE / MEDICAID BENEFITS

You have heard testimony about medical compensation that has been paid to [***plaintiff's name***]. Delaware law requires that you must consider such evidence in the determination of any damages that you may award. Although [__some / all__] of the expenses that [***he/she***] claims in this lawsuit have been paid through [__Medicare / Medicaid / Social Security disability payments__], [***plaintiff's name***] has a legal obligation to repay [__state the portion to be repaid__] of this compensation from any money that you might award in this case. On the other hand, if [***he/she***] does not recover in this case, there is no obligation for [***plaintiff's name***] to reimburse.

{**Comment**: *Because an evidentiary foundation must first be established as to the extent of the Medicare/Medicaid payments actually made and for the portion of that amount that is statutorily subject to a lien, a motion in limine may be necessary to resolve whether use of this instruction is appropriate given the facts of the case.*}

Source:
18 *Del. C.* § 6862; 42 U.S.C. § 1395y(b)(2); 42 C.F.R. §§ 411.24(b)-(i), 411.25, 411.26 (1998); *Nanticoke Mem. Hosp. v. Uhde*, Del. Supr., 498 A.2d 1071 (1985)(purpose of § 6862 is to prevent collection of a loss from a collateral public source and then a collection for the same loss from the party or hospital being sued); *Myer v. Dyer*, Del. Super., 643 A.2d 1382, 1388 (1994)(reviewing collateral source rule as applied to medical negligence claims).

22. DAMAGES

NO-FAULT INSURANCE

Under Delaware's no-fault Law, [***plaintiff's name***] has been compensated by [***his/her***] own insurance company for [__lost wages / medical expenses__] incurred [__within two years of the date of the accident / to the extent of the benefits available__]. The amounts of the bills paid are not in evidence because they have been paid. The law does not permit [***plaintiff's name***] to recover losses or expenses that have been paid as part of no-fault benefits.

The claims in evidence in this case are for [__lost wages / medical expenses__] beyond those already paid by no-fault insurance.

Source:
21 *Del. C.* § 2118(g)&(h); *Turner v. Lipshultz*, Del. Supr., 619 A.2d 912, 916 (1992); *Read v. Hoffecker*, Del. Supr., 616 A.2d 835, 836-38 (1992); *but see Wallace v. Archambo*, Del. Supr., 619 A.2d 911, 912 (1992); *Brown v. Comegys*, Del. Super., 500 A.2d 611, 614 (1985); *Webster v. State Farm Mut. Auto Ins. Co.*, Del. Super., 348 A.2d 329, 332 (1975); *DeVincentis v. Maryland Cas. Co.*, Del. Super., 325 A.2d 610, 612-13 (1974). *See also Burke v. Elliot*, 3d Cir., 606 F.2d 375, 378-79 (1979).

22. DAMAGES

ATTORNEY'S FEES -- STATE AND FEDERAL INCOME TAX

Any award that you might make to [***plaintiff's name***] in this case is not subject to federal and state income taxes. Thus, you should not consider taxes in fixing the amount of any award. You are also instructed that if an award is made to [***plaintiff's name***], it would be subject to a substantial attorney's fee.

{**Comment**: *Recently enacted federal legislation subjects awards for punitive and purely emotional damages to federal income taxation. See 26 U.S.C. § 104(a)(2) (1996) (this provision does not apply to wrongful death actions and, as provided under state law, to civil actions where only punitive damages may be awarded).*}

Source:

Sammons v. Ridgeway, Del. Supr., 293 A.2d 547, 551 (1972); *Gushen v. Penn Central Transp. Co.*, Del. Supr., 280 A.2d 708, 710 (1971)(in award of damages no account should be taken of taxes on future earnings); *Abele v. Massi*, Del. Supr., 273 A.2d 260 (1970).

22. DAMAGES

DAMAGES -- BREACH OF CONTRACT -- GENERAL

If you find that one party committed a breach of contract, the other party is entitled to compensation in an amount that will place it in the same position it would have been if the contract had been properly performed. The measure of damages is the loss actually sustained as a result of the breach of the contract.

DAMAGES -- BREACH OF CONTRACT -- GENERAL/NOMINAL

A party who is harmed by a breach of contract is entitled to damages in an amount calculated to compensate it for the harm caused by the breach. The compensation should place the injured party in the same position it would have been in if the contract had been performed.

If you find that [***plaintiff's name***] is entitled to a verdict in accordance with these instructions, but do not find that [***plaintiff's name***] has sustained actual damages, then you may return a verdict for [***plaintiff's name***] in some nominal sum such as one dollar. Nominal damages are not given as an equivalent for the wrong but rather merely in recognition of a technical injury and by way of declaring the rights of [***plaintiff's name***].

Source:
Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc., Del. Supr., 394 A.2d 1160, 1163-64 (1978)(loss of profits); *American General Corp. v. Continental Airlines*, Del. Ch., 622 A.2d 1, 11, *aff'd*, Del. Supr., 620 A.2d 856 (1992); *Farny v. Bestfield Builders, Inc.*, Del. Super., 391 A.2d 212, 214 (1978); *Gutheridge v. Pen-Mod, Inc.*, Del. Super., 239 A.2d 709, 714 (1967)(nominal damages); *J.J. White, Inc. v. Metropolitan Merchandise Mart*, Del. Super., 107 A.2d 892, 894 (1954).

DAMAGES FOR WRONGFUL DISCHARGE

If you find that [***plaintiff's name***] was wrongfully discharged from [***his/her***] employment, then [***he/she***] is entitled to an award of compensatory damages in the amount of the wages that would have been payable during the remainder of the employment term, less any amount actually earned or that might have been earned by [***plaintiff's name***] by due and reasonable diligence during the period after the discharge.

{*For retroactively reinstated employees, add the following language*}:

Because [***plaintiff's name***] was reinstated, the measure of your award for damages is the wages that would have been payable to the date of the reinstatement, or what is commonly known as "backpay," less any amount actually earned or that might have been earned by [***plaintiff's name***] by due and reasonable diligence during the period after the discharge.

Source:

Ogden-Howard v. Brand, Del. Supr., 108 A. 277, 278 (1919)(measure of damages is salary lost for period entitled to recover less amounts actually earned or might have earned by due and reasonable diligence during such period after discharge); *State v. Berenguer*, Del. Super., 321 A.2d 507, 510-11 (1974)(state employee). *See also* 29 *Del. C.* § 5949 (discharge and appeal procedures of state employees); *McClelland v. Climax Hosiery Mills*, N.Y. Supr., 169 N.E. 605, 609 (1930)(prima facie elements of damages for wrongful discharge).

22. DAMAGES

DUTY TO MITIGATE DAMAGES -- CONTRACT

Generally, the measure of damages for one who is harmed by a breach of contract is tempered by a rule requiring that the injured party make a reasonable effort, whether successful or not, to minimize the losses suffered. To mitigate a loss means to take steps to reduce the loss. If an injured party fails to make a reasonable effort to mitigate its losses, its damage award must be reduced by the amount a reasonable effort would have produced under the same circumstances. This reduction, however, must be measured with reasonable probability.

Source:

Lynch v. Vickers Energy Corp., Del. Supr., 429 A.2d 497, 504 (1981)(plaintiff with out-of-pocket expenses has duty to mitigate them); *McClain v. Faraone*, Del. Super., 369 A.2d 1090, 1093 (1977)(duty to mitigate losses in liquidation of property at foreclosure sale of injured party); *Nash v. Hoopes*, Del. Super., 332 A.2d 411, 414 (1975)(duty in contractual breach to mitigate losses when reasonably possible); *Katz v. Exclusive Auto Leasing, Inc.*, Del. Super., 282 A.2d 866, 868 (1971)(common law of contracts requires injured party to minimize losses); *See also* RESTATEMENT (SECOND) OF CONTRACTS § 350 (1979).

22. DAMAGES

PUNITIVE DAMAGES

If you decide to award compensatory damages to [***plaintiff's name***], you must determine whether [***defendant's name***] is also liable to [***plaintiff's name***] for punitive damages.

Punitive damages are different from compensatory damages. Compensatory damages are awarded to compensate the plaintiff for the injury suffered. Punitive damages, on the other hand, are awarded in addition to compensatory damages for the purpose of punishing the person doing the wrongful act and to discourage such persons and others from similar wrongful conduct in the future.

You may award punitive damages to punish [***defendant's name***] for [***his/her***] outrageous conduct and to deter [***him/her***], and others like [***him/her***], from engaging in similar conduct in the future if you find by a preponderance of the evidence that [defendant's name] acted [***intentionally/recklessly***]. Punitive damages cannot be awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence.

Intentional conduct refers to conscious awareness. Reckless conduct refers to conscious indifference. Each requires that the defendant foresee that [***his/her***] conduct threatens a particular harm to another. Reckless conduct is a conscious indifference that amounts to a "I don't care" attitude. Reckless conduct occurs when a person, with no intent to cause harm, performs an act so unreasonable and dangerous that [***he/she***] knows or should know that there is an eminent likelihood of harm that can result.

The law provides no fixed standards for the amount of punitive damages but leaves the amount to your sound discretion, exercised without passion or prejudice. In determining any award of punitive damages, you must consider the following: the reprehensibility or outrageousness of [***defendant's name***]'s conduct and the amount of punitive damages that will deter [***defendant's name***] and others like [***him/her***] from similar conduct in the future. You may consider [***defendant's name***]'s financial condition for this purpose only. [***Defendant's name***]'s financial condition must not be considered in assessing compensatory damages. Any award of punitive damages must bear a reasonable relation to [***plaintiff's name***]'s compensatory or nominal damages. If you find that [***plaintiff's name***] is entitled to an award of punitive damages, you must state the amount of punitive damages separately on the verdict form.

Source:

Devaney v. Nationwide Mut. Auto Ins. Co., Del. Supr., 679 A.2d 71, 76-77 (1996); *Tackett v. State Farm Fire and Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 265-66 (1995)(punitive damages available in bad faith action if breach is particularly egregious); *Jardel Co. v. Hughes*, Del. Supr., 523 A.2d 518, 527-31 (1987); *Saxton v. Harvey & Harvey*, Del. Super., C.A. No. 85C-JL-3, Poppiti, J. (Apr. 14, 1987).

22. DAMAGES

PUNITIVE DAMAGES MAY NOT BE RECOVERED

AGAINST ESTATE OF TORTFEASOR

[**Comment**: *Delaware law does not permit the recovery of punitive damages from the estate of the tortfeasor*.]

Source:
Ortiz v. Estate of White, Del. Super., C.A. No. 90C-10-233, Babiarz, J. (May 6, 1993)(Mem. Op. at 13)(*citing Pearson v. Semans*, Del. Super., C.A. No. 90C-MY-207, Balick, J. (May 12, 1991)(Let. Op. at 2)); RESTATEMENT (SECOND) OF TORTS § 908, cmts. a & b (1965).

PUNITIVE DAMAGES -- EMPLOYER OR PRINCIPAL OF TORTFEASOR

You may award punitive damages against [***employer / principal's name***] because of the act of its [__employee / agent__], [***tortfeasor's name***], if one of the following conditions is met:

(1) [***Employer or principal's name / managerial agent***] authorized the doing and manner of [***tortfeasor's name***]'s action; or

(2) [***Tortfeasor's name***] was unfit and [***employer or principal's name / managerial agent***] was reckless in [__employing / retaining__] [***him/her***]; or

(3) [***Tortfeasor's name***] was employed in a managerial capacity and was acting within [***his/her***] scope of employment; or

(4) [***Employer or principal's name/managerial agent***] ratified or approved [***tortfeasor's name***]'s action.

[**Comment**: *The Court will determine whether a party is a principal/employer as a matter of law. This instruction should be used only if an instruction for punitive damages is to be given against the individual tortfeasor and should be given immediately following the general instruction on "Punitive Damages" (21.27). The special verdict form should reflect that punitive damages may only be awarded against a principal/employer if punitive damages have first been awarded against the tortfeasor*.]

Source:

Ramada Inns, Inc. v. Dow Jones & Co., Del. Super., C.A. No. 83C-AU-56, Poppiti, J., at 3 (Feb. 9, 1988)(citing *DiStephano v. Hercules, Inc.*, Del. Super., C.A. No. 83C-JN-24, Taylor, J. (June 4, 1985) and *Roberts v. Wilmington Medical Center, Inc.*, Del. Super., Del. Super., 345 C.A. No. 1977, Christie, J. (Apr. 28, 1978)); RESTATEMENT (SECOND) OF TORTS § 909 (1965); *Porter v. Pathfinder Services, Inc.*, Del. Supr., 683 A.2d 40, 42 (1996)(employer-employee relationship determined as a matter of law).

22. DAMAGES

EFFECT OF INSTRUCTIONS AS TO DAMAGES

The fact that I have instructed you about the proper measure of damages should not be considered as my suggesting which party is entitled to your verdict in this case. Instructions about the measure of damages are given for your guidance only if you find that a damages award is in order.

Source:
Philadelphia, B. & W. R.R. Co. v. Gatta, Del. Supr., 85 A. 721, 729 (1913)(jury is sole judge of facts).

EFFECT OF INSTRUCTIONS AS TO PUNITIVE DAMAGES

The fact that I have instructed you about the proper measure of punitive damages should not be considered as an indication that [***plaintiff's name***] is entitled to recover punitive damages from [***defendant's name***]. The instructions on punitive damages are given only for your guidance, in the event you find in favor of [***plaintiff's name***] on [***his/her***] claims for punitive damages.

Source:
3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 74.02 (4th ed. 1987).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

EVIDENCE: DIRECT, INDIRECT OR CIRCUMSTANTIAL

Generally speaking, there are two types of evidence from which a jury may properly find the facts. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- circumstances pointing to certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from all the evidence in the case: both direct and circumstantial.

Source:

See 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.03 (4th ed. 1987); BLACK'S LAW DICTIONARY 555-56 (6th ed. 1990); 75A AM. JUR. 2d §§ 719-720.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

PRIOR SWORN STATEMENTS

If you find that a witness made an earlier sworn statement that conflicts with witness's trial testimony, you may consider that contradiction in deciding how much of the trial testimony, if any, to believe. You may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact or a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation made sense to you.

Your duty is to decide, based on all the evidence and your own good judgment, whether the earlier statement was inconsistent; and if so, how much weight to give to the inconsistent statement in deciding whether to believe the earlier statement or the witness's trial testimony.

Source:

See generally D.R.E. 801(d)(1), 803(8); *Lampkins v. State*, Del. Supr., 465 A.2d 785, 790 (1983)(prior statements generally); *Bruce E.M. v. Dorothy A.M.*, Del. Supr., 455 A.2d 866, 869 (1983)(prior sworn statements); 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 73.09 (4th ed. 1987).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

PRIOR INCONSISTENT STATEMENT BY WITNESS

A witness may be discredited by evidence contradicting what that witness said, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

It's up to you to determine whether a witness has been discredited, and if so, to give the testimony of that witness whatever weight that you think it deserves.

Source:
D.R.E. 613. *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 73.04 (4th ed. 1987).

OBJECTIONS - RULINGS ON EVIDENCE

Lawyers have a duty to object to evidence that they believe has not been properly offered. You should not be prejudiced in any way against lawyers who make these objections or against the parties they represent. If I have sustained an objection, you must not consider that evidence and you must not speculate about whether other evidence might exist or what it might be. If I have overruled an objection, you are free to consider the evidence that has been offered.

Source:

D.R.E. 103(c), 104(c)&(e), 105; *City of Wilmington v. Parcel of Land*, Del. Supr., 607 A.2d 1163, 1170 (1992); *Concord Towers, Inc. v. Long*, Del. Supr., 348 A.2d 325, 327 (1975)(court must avoid giving the impression of favoring one side or other in ruling on counsel's objections). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 70.01 (4th ed. 1987).

DEPOSITION - USE AS EVIDENCE

Some testimony is in the form of sworn recorded answers to questions asked of a witness before the trial. This is known as deposition testimony. This kind of testimony is used when a witness, for some reason, cannot be present to testify in person. You should consider and weigh deposition testimony in the same way as you would the testimony of a witness who has testified in court.

Source:

Del. C. Super. Ct. Civ. R. 32(a); D.R.E. 804(a)(5); *Firestone Tire & Rubber Co. v. Adams*, Del. Supr., 541 A.2d 567, 572 (1988). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 73.02 (4th ed. 1987).

USE OF INTERROGATORIES AT TRIAL

Some of the evidence has been in the form of interrogatory answers. An interrogatory is a written question asked by one party of the other, who must answer the question in writing and under oath, all before trial. You must consider interrogatories and the answers given to them just as if the questions had been asked and answered here in court.

Source:
Del. C. Super. Ct. Civ. R. 33(c). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.19 (4th ed. 1987).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

USE OF REQUESTS FOR ADMISSIONS AT TRIAL

Some of the evidence has been in the form of written admissions. You must regard as being conclusively proven all facts that were expressly admitted by the [***plaintiff / defendant's name***], [or all facts which the [***plaintiff / defendant's name***] failed to deny].

Source:
Del. C. Super. Ct. Civ. R. 36(b). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.17 (4th ed. 1987).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

STIPULATED EVIDENCE

The parties have agreed that if [***witness's name***] were called as a witness, [***he/she***] would testify that [__state the stipulated testimony__]. You must consider this stipulated testimony as if it had been given here in court.

Source:
See 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 71.08 (4th ed. 1987).

CREDIBILITY OF WITNESSES - WEIGHING CONFLICTING TESTIMONY

You are the sole judges of each witness's credibility. That includes the parties. You should consider each witness's means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witnesses' biases, prejudices, or interests; the witnesses' manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.

If you find the testimony to be contradictory, you must try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you can't do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable.

Source:

See 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 73.01 (4th ed. 1987); 75A AM. JUR. 2d §§ 747, 749, 750.

EXPERT TESTIMONY

Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. This skill or knowledge is not common to the average person but has been acquired by the expert through special study or experience.

In weighing expert testimony, you may consider the expert's qualifications, the reasons for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors I have previously mentioned for weighing the testimony of any other witness. Expert testimony should receive whatever weight and credit you think appropriate, given all the other evidence in the case.

{**Comment**: *This instruction should be given following the general instruction on witness credibility -- Jury Instr. No. 22.12.*}

Source:

D.R.E. 701, 702, 703.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

EXPERT OPINION MUST BE TO A REASONABLE PROBABILITY

You have heard experts being asked to give opinions based on a reasonable [__scientific, engineering, economic, etc.__] probability. In Delaware, an expert may not speculate about mere possibilities. Instead, the expert may offer an opinion only if it is based on a reasonable probability. Therefore, in order for you to find a fact based on an expert's testimony, that testimony must be based on reasonable probabilities, not just possibilities.

Source:

D.R.E. 703, 705 (expert testimony); *Van Arsdale v. State*, Del. Supr., 486 A.2d 1, 9 (1984)(medical expert testimony); *Delmarva Power & Light Co. v. Burrows*, Del. Supr., 435 A.2d 716, 720-21 (1981)(testimony of economist); *0.040 Acres of Land v. State* ex rel. *State Hwy. Dep't*, 198 A.2d 7, 11 (1964)(real estate appraisers); *General Motors Corp. v. Freeman*, Del. Supr., 164 A.2d 686, 688-89 (1960)(medical expert testimony).

EXPERT MEDICAL OPINION MUST BE TO A REASONABLE PROBABILITY

You have heard medical experts being asked to give opinions based on a reasonable medical probability. In Delaware, a medical expert may not speculate about mere possibilities. Instead, the expert may offer an opinion only if it is based on a reasonable medical probability. Therefore, in order for you to find a fact based on an expert's testimony, that testimony must be based on reasonable medical probabilities, not just possibilities.

Source:

D.R.E. 703, 705 (expert testimony); *Van Arsdale v. State*, Del. Supr., 486 A.2d 1, 9 (1984)(medical expert testimony); *General Motors Corp. v. Freeman*, Del. Supr., 164 A.2d 686, 688-89 (1960)(medical expert testimony).

STATEMENTS BY PATIENT TO DOCTOR

- SUBJECTIVE AND OBJECTIVE SYMPTOMS -

A doctor's opinion about a patient's condition may be based entirely on objective symptoms such as those revealed through observation, examination, tests or treatment. Or the opinion may be based entirely on subjective symptoms, revealed only through statements made by the patient. Or the opinion may be based on a combination of objective symptoms and subjective symptoms.

If a doctor has given any opinion based on subjective symptoms described by a patient, you may of course consider the accuracy of the patient's statements in weighing the doctor's opinion.

Source:
D.R.E. 703; *Storey v. Castner*, Del. Supr., 314 A.2d 187 (1973); *Loftus v. Hayden*, Del. Super., 379 A.2d 1136 (1977), *aff'd*, Del. Supr., 391 A.2d 749 (1978).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

NO UNFAVORABLE INFERENCES FROM EXERCISE OF PRIVILEGE

Our law protects persons in certain confidential relationships from having to testify about matters submitted to them in confidence. If any witness has exercised a privilege not to testify about something, or if I have ruled that a witness may not be compelled to give certain testimony, you must not assume anything as a result. That is, you must not draw any conclusion about the believability of that witness or about any matter relating to this trial.

Source:

D.R.E. 512; *see Texaco, Inc. v. Phoenix Steel Corp.*, Del. Ch., 264 A.2d 523, 524 (1970); *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, Del. Super., 623 A.2d 1118, 1121 (1992)(general statement of the parameters of privilege). *See also* 3 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 71.08 (4th ed. 1987) (constitutional privileges of defendant); Calif. Jury Inst. - Civ. § 2.27 (7th ed. 1986).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

CONFIDENTIAL SOURCES

During the trial, you occasionally heard witnesses refer to confidential sources. The law recognizes that people often will not disclose information to a news reporter unless the reporter promises confidentiality. The law gives journalists the right to keep their sources confidential. Reporters and their editors are allowed to refuse to disclose the names of sources. Similarly, certain information about which a reporter or editor testified has been deleted from documents you've seen if it might tend to disclose the identity of confidential sources. You must not draw any adverse conclusion solely from the fact that a reporter or editor refused to disclose a confidential source's identity.

At the same time, parties often disagree about the existence and content of confidential conversations. You should resolve any such disputes based on all the evidence before you.

Source:
10 *Del. C.* § 4322; D.R.E. 513; *Riley v. Moyed*, Del. Super., C.A. No. 84C-JA-78, Balick, J. (Mar. 25, 1985)(holding 10 *Del. C.* § 4322 constitutional), *aff'd*, Del. Supr., 529 A.2d 248 (1987).

ATTORNEY-CLIENT PRIVILEGE

During the trial, you have heard witnesses decline to answer because of the attorney-client privilege. You should know that it's perfectly proper for any witness to invoke the attorney-client privilege while testifying, and you shouldn't draw any conclusion adverse to either party simply because a witness has invoked the privilege. Nor should you speculate on what the witness might have testified if the privilege had not been raised. Confine your deliberations to the testimony that you have heard and to the documents in evidence.

Source:

D.R.E. 502, 512.

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

SPOLIATION

There is evidence from which you may conclude that [__***person's name***__] may have [intentionally / recklessly] suppressed or destroyed the following relevant evidence [__identify items destroyed or suppressed__]. In your deliberations, if you conclude that this is the case, that is, that the loss of [__identify items__] was due to the [intentional / reckless] conduct of [__***person's name***__], then you may conclude that the missing evidence would have been unfavorable to [__***person's name***__]'s case.

Source:

Lucas v. Christiana Skating Center Ltd., Del. Super., 722 A.2d 1247 (1998); *Collins v. Throckmorton*, Del. Supr., 425 A.2d 146, 150 (1980); *Equitable Trust Co. v. Gallagher*, Del. Supr., 102 A.2d 538, 541 (1954); *Equitable Trust Co. v. Gallagher*, Del. Supr., 77 A.2d 548, 549 (1950); *Wilmington Trust Co. v. General Motors Corp.*, Del. Ch., 51 A.2d 584 (1947); *Playtex v. Columbia Cas. Ins. Co.*, Del. Super., 1993 WL 390469, slip op. at 7, Del Pesco, J. (Sept. 20, 1993). *See also Gumbs v. International Harvester Corp.*, 3d Cir. 718 F.2d 88, 96 (1983); *Muzzleman v. National Rail Passenger Corp.*, D. Del., 839 F. Supp. 1094, 1098 (1993).

SEATBELT EVIDENCE - CURATIVE INSTRUCTION

Ordinarily, you can't consider the use or non-use of a seatbelt as evidence of [***plaintiff's name***]'s negligence. But there are two exceptions:

First, you can consider this evidence in deciding whether there is a defect in the overall design of the passenger-restraint system; and

Second, you can consider this evidence in deciding whether the use or non-use of the seatbelt was a supervening cause of [***plaintiff's name***]'s enhanced injuries.

{**Comment**: *This instruction is relevant only to products liability claims against an automobile manufacturer.*}

Source:

21 *Del. C.* § 4802(i); *General Motors Corp. v. Wolhar*, Del. Supr., 686 A.2d 170, 176 (1996). *See also* D.R.E. 105 (instructions limiting the use of conditionally admitted evidence); *Sears Roebuck & Co. v. Huang*, Del. Supr., 652 A.2d 568, 574 (1995)(admission of evidence for a limited purpose).

PLEA OF NOLO CONTENDERE - CURATIVE INSTRUCTION

In this case, a plea of nolo contendere that [***plaintiff / defendant's name***] made to [_____] charges in the [_____] Court has been mentioned. Nolo contendere means literally, "I will not contest it," and it allows the criminal court in which the plea was entered to proceed to sentencing. The plea does not, however, formally admit the facts alleged in the charge. You are not permitted to consider the plea of nolo contendere in deciding this case.

{**Comment**: *This instruction is limited to use as a curative charge in circumstances where mention of a nolo contendere plea was made during trial in spite of the fact that such a plea is inadmissible.*}

Source:
D.R.E. 410; *McNally v. Eckman*, Del. Supr., 466 A.2d 363, 369 (1983); *V.F.W. Hold. Co. v. Delaware Alcoholic Bev. Contr. Comm'n*, Del. Super., 252 A.2d 122, 123 n.1 (1969).

23. EVIDENCE AND GUIDES FOR ITS CONSIDERATIONS

TESTIMONY REGARDING POLYGRAPHS - CURATIVE INSTRUCTION

During the trial you have heard testimony about polygraph examinations, or lie-detector tests, taken by [__***person's name***__]. In Delaware, the results of lie-detector tests are not admissible to prove whether someone is telling the truth because the scientific reliability of these tests has not been established. Accordingly, the testimony about the results of any lie-detector tests is not admitted to prove whether [__***person's name***__] is telling the truth and may not be considered by you as an indicator of [***his/her***] credibility.

{**Comment**: *Polygraph evidence is generally inadmissible. If polygraph evidence has been admitted for another purpose, the limited use of such evidence must be explained by the court.*}

Source:
See Melvin v. State, Del. Supr., 606 A.2d 69, 71 (1992); *Whalen v. State*, Del. Supr., 434 A.2d 1346, 1353 (1980), *cert. denied*, 455 U.S. 910, 102 S. Ct. 1258, 71 L.Ed.2d 449 (1982); *Foraker v. State*, Del. Supr., 394 A.2d 208, 213 (1978). *See also* D.R.E. 702.

24. CONCLUDING INSTRUCTIONS

SYMPATHY

Your verdict must be based solely on the evidence in the case. You must not be governed by prejudice, sympathy, or any other motive except a fair and impartial consideration of the evidence. You must not, under any circumstances, allow any sympathy that you might have for any of the parties to influence you in any way in arriving at your verdict.

I am not telling you not to sympathize with the parties. It is only natural and human to sympathize with persons involved in litigation. But you must not allow that sympathy to enter into your consideration of the case or to influence your verdict.

Source:
Based on Judge Christie's charge in *Vigneulle v. Goldsborough*. *See DeAngelis v. Harrison,* Del. Supr., 628 A.2d 77, 80 (1993); *Delaware Olds, Inc. v. Dixon*, Del. Supr., 367 A.2d 178, 179-80 (1976). *See also* 75 AM. JUR. 2D Trial §§ 648-649; 53 AM. JUR. 2D §§ 495-496.

JUROR NOTE-TAKING AND EXHIBIT BINDERS

{*At beginning of trial*}:

I am allowing you to take notes during trial. If you wish to take notes, be sure that your note-taking does not interfere with your ability to follow and consider all the evidence. You may not discuss your notes with anyone until deliberations begin. At the end of each day, the Bailiff will collect your notes and return them to you the next day.

{*at the close of evidence*}:

I have allowed you to take notes during trial. The purpose of taking notes is to assist you during your deliberations. During your deliberations you should not allow the notes taken by one juror or several jurors to control your consideration of the evidence. Instead, give due regard to the individual recollection of each juror whether or not supported by written notes. Your ultimate judgment should be the product of the collective memory of all twelve jurors.

{*if appropriate*}:

I have also permitted you to have notebook binders containing exhibits. The fact that evidence is contained in the binder does not mean that you should give it more weight than other evidence in the case. These documents have no more or less weight than the other evidence presented.

Source:

Estate of Tribbitt v. Alexander, Del. Super., C.A. No. 95C-02-138, Herlihy, J. (Jan. 17, 1997); *Bradley v. A.C. & S. Co.*, Del. Super., 1989 WL 70834, Taylor, J. (May 23, 1989) at *1-2; In re *Asbestos Litigation*, Del. Super., 1988 WL 77737, Taylor, J. (June 28, 1988) at *2.

See also United States v. Maclean, 3d Cir., 578 F.2d 64, 65-67 (1978)(permitting note-taking by jurors); *Esaw v. Friedman*, Conn. Supr., 586 A.2d 1164 (1991)(permitting juror notetaking); *Wigler v. City of Newark*, N.J. Super. A.D., 309 A.2d 897, 899 (1973)(juror notetaking was not improper and it was within discretion of trial court to control and direct the manner of juror notetaking), *cert. denied*, 317 A.2d 703 (1974); Note, *Court-Sanctioned Means of Improving Jury Competence in Complex Civil Litigation*, 24 ARIZ. L. REV. 715, 720 (1982).

24. CONCLUDING INSTRUCTIONS

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

I have read a number of instructions to you. The fact that some particular point may be covered in the instructions more than some other point should not be regarded as meaning that I intended to emphasize that point. You should consider these instructions as a whole, and you should not choose any one or more instructions and disregard the others. You must follow all the instructions that I have given you.

Source:

DEL. CONST. art. IV, § 19; *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096 (1991)(instructions to be considered as a whole); *Sirmans v. Penn*, Del. Supr., 588 A.2d 1103, 1104 (1991)(instructions are not in error if they correctly state the law, are reasonably informative and not misleading judged by common practices and standards of verbal communication); *Dawson v. State*, Del. Supr., 581 A.2d 1078, 1105 (1990)(jury instructions do not need to be perfect); *Probst v. State*, Del. Supr., 547 A.2d 114, 119 (1988)(entire charge must be considered as a whole); *Haas v. United Technologies Corp.*, Del. Supr., 1173, 1179 (1982), *appeal dismissed*, 459 U.S. 1192, 103 S. Ct. 1170, 75 L.Ed.2d 423 (1983); *State Hwy. Dep't v. Bazzuto*, Del. Supr., 264 A.2d 347, 351 (1970); *Cloud v. State*, Del. Supr., 154 A.2d 680 (1959); *Philadelphia B. & W. R.R. Co. v. Gatta*, Del. Supr., 85 A. 721, 729 (1913)(jury is sole judge of facts).

24. CONCLUDING INSTRUCTIONS

COURT IMPARTIALITY

Nothing I have said since the trial began should be taken as an opinion about the outcome of the case. You should understand that no favoritism or partisan meaning was intended in any ruling I made during the trial or by these instructions. Further, you must not view these instructions as an opinion about the facts. You are the judges of the facts, not me.

Source:

DEL. CONST. art. IV, § 19; *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096 (1991)(instructions to be considered as a whole); *Probst v. State*, Del. Supr., 547 A.2d 114, 119 (1988)(same); *Haas v. United Technologies Corp.*, Del. Supr., 1173, 1179 (1982), *appeal dismissed*, 459 U.S. 1192, 103 S. Ct. 1170, 75 L.Ed.2d 423 (1983); *State Hwy. Dep't v. Bazzuto*, Del. Supr., 264 A.2d 347, 351 (1970); *Cloud v. State*, Del. Supr., 154 A.2d 680 (1959); *Philadelphia B. & W. R.R. Co. v. Gatta*, Del. Supr., 85 A. 721, 729 (1913)(jury is sole judge of facts).

24. CONCLUDING INSTRUCTIONS

JURY'S DELIBERATIONS

How you conduct your deliberations is up to you. But I would like to suggest that you discuss the issues fully, with each of you having a fair opportunity to express your views, before committing to a particular position. You have a duty to consult with one another with an open mind and to deliberate with a view to reaching a verdict. Each of you should decide the case for yourself, but only after impartially considering the evidence with your fellow jurors. You should not surrender your own opinion or defer to the opinions of your fellow jurors for the mere purpose of returning a verdict, but you should not hesitate to reexamine your own view and change your opinion if you are persuaded by another view.

Your verdict, whatever it is, must be unanimous.

[EXCUSE JURY ALTERNATES -- SWEAR BAILIFF]

Source:
Hyman Reiver & Co. v. Rose, Del. Supr., 147 A.2d 500, 505-07 (1958)(the private deliberations of the jury should not be a concern of the court).

24. CONCLUDING INSTRUCTIONS

WHEN JURY FAILS TO AGREE -- *ALLEN* CHARGE

Members of the jury, I am told that you have been unable to reach a verdict. I have a few thoughts that you may wish to consider in your deliberations, along with the evidence and the instructions previously given to you.

Every case is important to the parties involved. The trial has been time-consuming and expensive to both [***plaintiff's name***] and [***defendant's name***]. But if you should fail to agree upon a verdict, the case is left open and undecided. Like all cases, it must be disposed of in some way. There is little to believe that another trial would not be equally time-consuming and expensive to all persons involved, and there is little reason to think that the case can be tried again better or more exhaustively than it has been in this trial. Any future jury must be selected in the same manner and from the same source as you have been chosen. So it's unlikely that the case could ever be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it.

I don't want any of you to surrender your conscientious convictions. But it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without sacrificing individual judgment. Each of you must decide the case for yourself, but you should do so only after considering the evidence with your fellow jurors, and during your deliberations you should not hesitate to change your opinion if you become convinced that another position is correct.

You may conduct your deliberations as you choose, but I suggest that you now retire and carefully reconsider all the evidence before you and try your hardest to reach a unanimous verdict.

Source:

Rush v. State, Del. Supr., 491 A.2d 439, 452-53 (1985); *Brown v. State*, Del. Supr., 369 A.2d 682, 684 (1976)("Allen" type charge generally proper in order to encourage jury to reach a verdict where unanimity is required); *Streitfeld v. State*, Del. Supr., 369 A.2d 674, 677 (1977)(same); *Hyman Reiver & Co. v. Rose*, Del. Supr., 147 A.2d 500, 506-07 (1958).